mation that will show the court is mistaken. The information offered to the court in this case was that of lawyers, all prominent and some eminent in the profession in Oklahoma, who testified under oath that the case had not been accepted by the profession. Testimony was also offered to the effect that various District and County Judges had refused to follow the opinion. The writer believes that this evidence should have been received. The court should not find that to be true which is not true, and when uncontradicted sworn testimony is offered upon matters material for the court to know, the writer of this brief believes the court should hear it. If the court was mistaken in holding as it did in *Pigeon* v. *Buck*, that the case of *Shulthis* v. *McDougal* had become a rule of property, it should have heard evidence and corrected the mistake. That the Supreme Court of Oklahoma was mistaken will not be doubted by anyone who will read the excluded evidence. While no case exactly like this has been found, the discussion in Sections 849 and 850 of Chamberlayne on Evidence as to the means by which a court can inform itself, may assist the court in arriving at a conclusion upon this point. The evidence, as it appears in the record, is now offered to this court for its information in arriving at a conclusion as to whether or not the rule in *Shulthis* v. *McDougal* has become a rule of property.

Specification V.

The Supreme Court of Oklahoma erred in holding that the decision in *Shulthis* v. *McDougal* had become a rule of property.

If it was the duty of the Supreme Court to hear evidence on this question, there can be no doubt that the fifth specification of error should be sustained. The evidence shows that ninety-five per cent of the sales made prior to the decision in which this question could arise were made on the theory that the allotment was a new acquisition. If this court can consider the evidence that was excluded there can be only one result. But the plaintiff in error insists that the court erred in so holding, even though his evidence bearing upon the question was properly excluded.

In the opinion in this case the Supreme Court of Oklahoma concedes that prior to the decision in *Shulthis* v. *McDougal* a large per cent of the lawyers in Eastern Oklahoma considered allotments new acquisitions. The court said:

> "While we are aware of the fact that a large per cent of the lawyers on the eastern side of this state were of the opinion that the titles to land similar to the title in question were a new acquisition, etc."

Taking that statement for a foundation, let us follow up the subject and see what has been done with the question in the courts and among the bar.

That opinion was rendered June 3, 1909, and the case was appealed to this court. The opinion was criticised by the Central Law Journal (Vol. 69, p. 217) some three months after it was rendered. It was also criticised in the Oklahoma State Bar Association (Report of Oklahoma Bar Association 1909) in a paper read by a member, who, at least on account of his official position if nothing else, was respected by the bar of the state. It was also referred to in section 62 of Bledsoe's Indian Land Laws and it was said there that the question would not be regarded as settled until passed upon by this court. The appeal was dismissed by this court June 7, 1912, because the federal question was not properly presented in the original bill or declaration (225 U. S. 561, 56 L. ed. 1205). It was less than one year from that time until on the 23rd day of April, 1913, the Supreme Court of Oklahoma decided the case of *Pigeon* v. *Buck*. The suit in *Pigeon* v. *Buck* was instituted September 13, 1910, long before the appeal in *Shulthis* v. *McDougal* was dismissed by this court, and must have been filed in the Supreme Court of Oklahoma eighteen months before it was decided and several months before this court dismissed the appeal in *Shulthis* v. *MDcougal*. The case of *Roberts* v. *Underwood*, 3 Okla. 376, 132 Pac. 673, which is now in this court on appeal, must have been brought about the same time. The attorneys bringing these suits did not believe the case of *Shulthis* v. *McDougal* would become the settled law.

So far as the decision in *Shulthis* v. *McDougal* is heard of it is being criticised or appealed from. The plaintiff in error offered evidence to the effect that several trial judges refused to follow it. The writer may be going too far in referring to this offered evidence. If it is proper to refer to it, then it is proper to say that no case was ever appealed from any court that declined to follow the *Shulthis* rule. In the case of *Barnes* v. *Keys*, 36 Okla. 6, 127 Pac. 261, decided October 23, 1912, the facts were similar to this case, but, though the lawyers in the case were among the leaders in the eastern part of the state, none of them took the position that the father of the allottee owned more than a life estate and the property was divided on that theory. The facts with reference to the relationship do not appear in the opinion, but it is believed not improper to state them here for the benefit of the court when it comes to consider the question of whether *Shulthis* v. *McDougal* became a rule of property.

Rule of Property Can Be Created Only by Court of Last Resort.

It is laid down in notes to 11 Cyc 756, that a rule of property can only be established by the decision of a court of last resort. The following from the case of *The Ocean Beach Association* v. *Brinley*, 34 N. J. Eq. 438, 448, lays down a rule that seems to govern many courts. In that case the court uses the following language:

"But the complainants insist that if the practice cannot have effect as a custom, it should nevertheless be held effectual to bar the defendant's claim in virtue of the maxim *communis error facit jus.* This, though an admitted legal maxim, is seldom applied in the administration of justice, and never without the utmost caution. The reason is obvious, it permits misconception to become law in destruction of the real law of the case. In my judgment, no error should be allowed to possess that degree of dignity and force until it has been sanctioned by a tribunal of superior jurisdiction, and subsequently treated as law in the actual business affairs of men. The rule I believe to be this: That no error is entitled to be accepted as law by the courts, until it has been declared to be law by a competent judicial decision, and afterwards so far adopted in practice that a return to the true law would seriously impair existing interests.

"In *O'Connell* v. *Queen,* 11 Cl. & Fin. 373, Lord DENMAN said:

> 'And when in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine—a mere repetition of the cantilena of lawyers—cannot make it law if it be irreconcilable with some clear legal principle.'

"And Lord BROUGHAM, in *DeVaynes* v. *Noble,* 2 Russ. & Myl. 506, said:

> 'Common or universal error may be said to make the law, especially if the opinion of lawyers and the decisions of judges have been ruled by it.'

"Justice BLACKBURN says, in *Jones* v. *Tapling*, 12 C. B. (N. S.) 846:

> 'There are cases in which a decision originally erroneous, has been so long acquiesced in and acted on, that a return to the proper principle would greatly affect existing interests. This is peculiarly the case in questions of conveyancing law. In such cases the maxim *communis error facit jus* may be applied.'

"The error approved in *Morecock* v. *Dickins*, Amb. 678, was one that had been sanctioned by a prior adjudication. So, too, in *D'Arcy* v. *Blake*, 2 Sch. & Lef. 387, the error approved by Lord REDESDALE was one which prior decisions had made law. He said:

> 'The decisions to the full extent are so old, so strong, and so numerous, so adopted in every book on the subject, and so considered as settled law, that it would be very wrong to attempt, at this time, to alter them.'"

"In my opinion, there is no evidence whatever, in this case, that the error which the complainants insist shall have the force of law, has ever been recognized or applied by any authority competent to give it the force of law."

It has been held that decisions of Circuit Courts could not establish a rule of property that would be binding on the Circuit Court of Appeals. (*American Mortgage Co.* v. *Hopper*, 64 Fed. 553; *The Madrid*, 40 Fed. 677). If this doctrine is correct then the Circuit Court of Appeals cannot by one decision create a rule of property binding on this court, and

certainly the Supreme Court of Oklahoma cannot do so in a case that is immediately appealed here.

On these Indian questions it is only when this court has passed on the question that the public feel that it is settled. The situation could not be stated better than it was stated by Mr. C. L. Thomas (since dead) at that time representing the defendants in error, in the first question he asked Mr. N. A. Gibson, whose deposition was being taken by the plaintiff in error, and Mr. Gibson's answer thereto. (Rec., p. 68.) His question was, "The fact is that every lawyer and practically every man engaged in the buying and selling of Indian land is more or less skeptical about every decision until it has been passed on by the Supreme Court of the United States?" To which Mr. Gibson answered, "Yes, sir."

In the case of *Gannon* v. *Johnston*, 40 Okla. 695, 140 Pac. 430, it was held that the doctrine of Rule of Property could not be applied to make a valid conveyance of restricted land. The rule there laid down may not be applicable to this case because it may be that no governmental policy is involved in the present case, but it is referred to for the consideration of the court.

To Establish Rule of Property the Doctrine Must Be Acquiesced In.

The writer believes that one of the principal elements of the doctrine of Rule of Property is that

it has been acquiesced in. This court can see from the numerous appeals that come to it, if in no other way, that the case of *Shulthis* v. *McDougal* has never been acquiesced in. The bar has not believed it to be the law. The court in passing on this question has the right to consider publications referring to the case. In section 62 of the first edition of Bledsoe's Land Laws it is said that it had been the practically unanimous opinion of lawyers in Eastern Oklahoma that an estate such as is involved here was a new acquisition. The same statement was made in a paper read before the Oklahoma State Bar Association. (Report Oklahoma Bar Association, 1909, p. 161.) In a brief by Mr. Preston C. West, now Assistant Attorney General of the United States, and Mr. George S. Ramsey, who is one of the counsel for defendants in error in this case, filed in this court in the appeal of *Shulthis* v. *McDougal*, No. 156, October Term, 1911, they say (p. 70):

> "With these holdings * * * it is little wonder that the bar and bench in the Indian Territory were practically unanimous in holding that the allotment of a citizen of the tribe was a new acquisition in such allottee and not ancestral."

If it is the law that a rule of property can be established by general concensus of opinion without the decision of a court of last resort then there was a rule of property to the effect that the allotments were new acquisitions which existed prior to the decision in *Shulthis* v. *McDougal* and the defendants in error are IN A DILEMMA.

If it takes a decision of a court of last resort to establish the rule they fail on this point because this court has never passed on the question. If the doctrine can be established by general acquiescence, it had been established contrary to the doctrine of *Shulthis* v. *McDougal* before that decision was rendered.

Justice Requires Reversal of the Rule in *Shulthis* v. *McDougal.*

If it be true that most of the lands similarly situated have been sold on the theory that the allotments were new acquisitions, justice demands that this case be reversed. The theory of the Supreme Court of Oklahoma that if only a small number of titles have been acquired in reliance upon the doctrine of *Shulthis* v. *McDougal,* it should stand, cannot influence this court, if many more titles have been acquired on the theory that allotments were new acquisitions.

In *Mason* v. *Nelson,* 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, the court said:

> "We are not insensible to the great importance of the doctrine of *stare decisis*—a doctrine of recognized value in all countries whose jurisprudence, like our own, is founded so largely on precedents. We know that the courts in such countries, as a general rule, will adhere to a decision found to be erroneous, when it has been acquiesced in for a great length of time so

as to become accepted law constituting a rule of property. And there are other conditions, restricted in their nature, where the doctrine may be properly applied, but none of them require or permit that a court should adhere to a decision found to be clearly erroneous, which affects injuriously a general business law; and under the circumstances indicated here. As it has been well said, 'Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence on all future time, it becomes the duty, as well as the right of the court to consider carefully and to allow no previous error to continue if it can be corrected. The foundation of the rule of *stare decisis* was promulgated on the ground of public policy, and it would be *an egregious mistake to allow more harm than good to accrue from it.*' 26 Am. & Eng. Enc. Law, 2 ed. p. 184. This decision, announced something like ten years ago, cited not more than twice as direct authority for the proposition it contains, and disapproved in the state where it seems to have originated, commented on adversely by the intelligent annotators and reviewers of the country, and pronounced unsound by the great weight of authority bearing on the question, cannot be considered to have ever been acquiesced in, or to have become the accepted law of the land. Nor are we inadvertent to the fact that this contract was made at a time when *Finch* v. *Gregg* expressed the rule which prevailed with us on the question presented; but we are of the opinion that this should not be allowed to affect the result." (Italics by the writer.)

The allotment of most of the Creek lands was completed by 1906. Statehood came in 1907 and it has been generally supposed that the Oklahoma law governs in cases where the descent has been cast since statehood. (Though that view is challenged and the question will be before this court before long.) Purchasers had from the time allotments were made until 1909 to buy allotments such as the one in controversy. This court cannot but be aware of the activity of purchasers of Indian lands. From the public history of the Indian country this court will know that if allotments such as this were considered new acquisitions, most of them had been bought and sold on that theory before the decisions in *Shulthis* v. *McDougal,* and that comparatively few could have been purchased since. Those who sold believing they had a life estate, only obtained a consideration in proportion. It does not seem fair to confirm such conveyances into fee simple titles when the consideration was not paid on that theory. The facts are that the construction placed on this question by the bench and bar prior to the *Shulthis* case, had almost become a technical rule of property, and this appeal and the other appeals on the same question to this court are to prevent that rule from being overturned by the decision in *Shulthis* v. *McDougal.*

Resume.

It is the position of the plaintiff in error that the Statute of Descent and Distributions as contained in chapter 49 of Mansfield's Digest of the Statutes of Arkansas had the same meaning in the Indian Territory as it did in Arkansas.

That the estate of Andrew J. Berryhill in his allotment was a new acquisition.

That the evidence offered to show that the decision in *Shulthis* v. *McDougal* never became a rule of property should have been considered by the courts of Oklahoma and should be considered by this court.

That the doctrine of *Shulthis* v. *McDougal* never became a rule of property.

Wherefore, plaintiff in error insists this case should be reversed.

Respectfully submitted,

MALCOLM E. ROSSER,
Counsel for Plaintiff in Error.

WILLIAM S. COCHRAN,
Of Counsel.

(24,420)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 676.

DANIEL A. McDOUGAL, PLAINTIFF IN ERROR,

vs.

EDMOND McKAY, PERRY McKAY, JOHN V. McKAY, AND ALBERT W. SHULTHIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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1 In the Supreme Court of the United States.

DANIEL A. McDOUGAL, Plaintiff in Error,

vs.

EDMOND McKAY, PERRY McKAY, JOHN V. McKAY, and ALBERT W. SHULTHIS, Defendants in Error.

On Writ of Error to the Supreme Court of the State of Oklahoma.

2 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, this October 20, 1914.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma,
By JESSIE PARDOE, *Deputy.*

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Edmond McKay, Perry McKay, John V. McKay, and Albert W. Shulthis, Greeting:

You and each of you are hereby admonished to be and appear at the Supreme Court of the United States, at the City of Washington in the District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of said Supreme Court of the United States wherein Daniel A. McDougal is Plaintiff in Error and you are Defendants in Error, to show cause if any there be, why the said judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America this 5 day of October, A. D. 1914, and of the Independence of the United States the one hundred and thirty ninth.

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma,
By JESSIE PARDOE, *Deputy.*

[Seal Supreme Court, State of Oklahoma.]

Service of the above citation is hereby accepted on behalf of the defendants in error on this the 12th day of October, A. D. 1914.

GEORGE S. RAMSEY,
EDGAR A. DE MENLES,
Attorneys for Defendants in Error.

Filed Oct. 20, 1914. W. H. L. Campbell, Clerk.

4 Filed Oct. 5, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6372.

DANIEL A. MCDOUGAL, Plaintiff in Error,
vs.
EDMOND MCKAY, PERRY MCKAY, JOHN V. MCKAY, and ALBERT W. SHULTHIS, Defendants in Error.

Petition for Writ of Error.

Comes now the above named, Daniel A. McDougal, plaintiff in error in the above styled cause, and respectfully shows that on the 25th day of August, A. D. 1914, the Honorable Supreme Court of the State of Oklahoma rendered a final judgment against this petitioner, the said Daniel A. McDougal, in a certain case wherein he, the said Daniel A. McDougal, was plaintiff in error and Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis were defendants in error, which judgment of the said Supreme Court of the State of Oklahoma affirmed the judgment of the District Court of Tulsa County and also ordered that the said plaintiff in error, Daniel A. McDougal, should pay all the costs of said case in the said Supreme Court, as will appear by reference to the record and proceedings of said suit; that said Supreme Court of the State of Oklahoma is the highest Court of said State in which a decision in said case could be had and that manifest error has occurred in the rendering of said judgment greatly to the damage of the said Daniel A. McDougal, this petitioner, whereby he feels aggrieved; that by the record and proceedings in said case it will appear that the said Daniel A. McDougal brought this action claiming to be the owner of the following described lands, to-wit:

The East Half (E/2) of the North-west Quarter (NW/4)
5 of the North-east Quarter (NE/4) and the South-west Quarter (SW/4) of the North-west Quarter (NW/4) of the North-east Quarter (NE/4) of Section Thirteen (13), Township Seventeen (17) North, Range Twelve (12) East, containing Thirty (30) acres, more or less, according to the United States survey thereof, subject to a life estate in the defendants Edmond McKay, Perry McKay and John V. McKay.

That the said Daniel A. McDougal claims and derives his title to the said lands as follows:

That on towit the 8th day of March, 1911, there was negotiated by and between the Commission to the Five Civilized Tribes, consisting at that time of Henry L. Dawes, Tams Bixby, Archibald S. McKennon and Thomas B. Needles and certain commissioners on behalf of the Muskogee or Creek Tribe of Indians in Indian Territory, to-wit: Pleasant Porter, George A. Alexander, David M. Hodge, Isparhecher, Albert P. McKellop and Cub McIntosh a certain agreement providing for a general allotment, in severalty, of the lands of said Muskogee or Creek Tribe of Indians, which said agreement or treaty was afterwards enacted into a law by the Congress of the United States, by an act of Congress entitled "An Act to Ratify and Confirm an Agreement with the Muskogee or Creek Tribe of Indians, and for other purposes," approved March 1, 1901, and ratified by the Creek National Council May 25, 1901; and by Section three of said act it was provided that all lands of said tribe except as therein provided should be allowed among the citizens of the tribe, by said Commissioner, so as to give each an equal share of the whole, in value, as nearly as may be, in the manner in said act provided; which said act appears in 31 United States Statutes at Large 861. That thereafter a certain agreement supplemental to said last recited agreement and act of Congress, was negotiated between the Commission to the Five Civilized Tribes consisting of Henry L. Dawes Tams Bixby, Thomas B. Needles and Clifton R. Breckinridge, and certain commissioners of the Muskogee or Creek Tribe of Indians in Indian Territory, to-wit: Pleasant Porter, Roley McIntosh, Thomas W. Perryman, Amos McIntosh and David M. Hodge, which said supplemental agreement was enacted into law by Congress of the United States by an act entitled "An Act to Ratify and Confirm a Supplemental Agreement with the Creek Tribe of Indians, and for other purposes," approved June 30, 1902, and appears in 32 Statutes at Large 500, and by proclamation of the President as therein provided, became operative August 8, A. D. 1902; that by Section six of said last named act it was provided:

"The Provisions of the act of Congress approved March 1, 1901, (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in the Indian Territory; Provided, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation; And provided further, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in Chapter 49."

6 And by Section Seven of said act it was further provided:

"All children born to those citizens who are entitled to enrollment as provided by the act of Congress approved March 1, 1901,

(31 Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, then the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

That by Section Twenty of said act, it was further provided:

"This agreement is intended to modify and supplement the agreement ratified by said act of Congress approved March 1, 1901, and shall be held to repeal any provision in that agreement or in any prior agreement treaty, or law in conflict herewith."

That Chapter 49 of Mansfield's Digest, entitled "Descents and Distributions," as referred to in said act of Congress and as adopted and put in force in the Creek Nation of the Indian Territory and which thereby became a law of the United States, provides as follows:

"SECTION 2522. When any person shall die, having title to any real estate of inheritance, or personal estate (*b*), not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

First: To children, or their descendants, in equal parts.

Second: If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third: If there be no children, nor their descendants, father, mother, brother or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts."

7 "SEC. 2531. In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his life time, and then descend in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her life-time; then to descend to the collateral heirs as before provided (*d*)."

That in the month of May, A. D. 1901, there was born to one George Franklin Berryhill and Clementine Berryhill, husband and wife, a son, who was named Andrew J. Berryhill; that said George Franklin Berryhill is, and at all the times mentioned in the petition was, a Creek Indian and a citizen of the Creek Nation, duly enrolled as such by the Commission to the Five Civilized Tribes as a citizen by blood, and his name appears upon the rolls of said Commission as a mixed blood Indian and not a full-blood; that said Clemen-

tine Berryhill, wife and mother, is not and at no time has been a citizen of the Creek Nation; that said Andrew J. Berryhill departed this life in the month of November, 1901, intestate and unmarried, leaving no brothers or sisters surviving him; that thereafter and on or about the 8th day of October, A. D. 1902, the name of the said Andrew J. Berryhill was duly placed upon the tribal rolls of the Creek Nation as a citizen thereof, by the Commission to the Five Civilized Tribes, and his enrollment as such citizen was approved by the Secretary of the Interior on November 14, 1902; that on the — day of ——, in the year 1904 the Commission to the Five Civilized Tribes set apart and allotted to said Andrew J. Berryhill, deceased, the lands described in this petition with other lands, and that on or about October 10, 1905 the United States of America together with the Creek Nation, did, through their legal representatives, execute a deed or patent to said lands, and the Principal Chief of the Creek Nation, P. Porter, on behalf of the Creek Nation did, on or about the 10th day of October, 1905, execute a deed or patent covering and describing said lands, which was subsequently approved by the Secretary of the Interior in behalf of the United States of America, confirming the title in and to said lands in the heirs of Andrew J. Berryhill, deceased, which said patent was afterwards and in the year 1905 filed with the Commission to the Five Civilized Tribes and recorded in the records in the office of the Commission to the Five Civilized Tribes, as required by law.

That on the 5th day of June, 1906 the said George Franklin Berryhill and Clementine Berryhill, father and mother of Andrew J. Berryhill, deceased, executed and delivered to the defendants, Edmond McKay and Perry McKay, a warranty deed, whereby they did grant, bargain, sell and convey unto the said Edmond and Perry McKay all their right, title and interest in and to the lands in this petition hereinbefore described, which deed was duly filed for record in the Office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa; and that by said deed there was conveyed to the said Edmond and Perry McKay a life estate only and no more in and to the lands and premises hereinbefore described.

8 That thereafter and on to-wit the 9th day of August, A. D. 1910, the said Edmond and Perry McKay, joining with them their wives Florence and Gusta McKay, executed and delivered to John V. McKay a deed of conveyance of an undivided one-third interest in whatever right they had in the lands hereinbefore described, which this plaintiff in error avers was a life estate only, and no more, which said deed was filed for record and now appears of record in the office of the Register of Deeds in and for Tulsa County, Oklahoma, record in Record Book 128, at page 342, and a copy of which deed is attached hereto, marked Exhibit "B" and made a part of this petition; and that by said deed the defendant John V. McKay, became the owner of an undivided one-third interest in and to a life estate only in the lands hereinbefore described and no more.

That Andrew J. Berryhill, deceased, left surviving him the following uncles and aunts, Martha E. Lee Kiefer, Stanford Berryhill,

Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and Josie Morton, and that said uncles and aunts inherited the fee in the land hereinbefore described, subject to a life estate in the father, George Franklin Berryhill, under the provisions of said Chapter 49 of Mansfield's Digest of the Laws of Arkansas put in force as heretofore alleged and as hereinbefore set out; and that no person or persons other than said uncles and aunts inherited any right, title or interest in or to said lands, and that the only person other than said uncles and aunts who inherited any right or interest therein was the said George Franklin Berryhill, the father of Andrew J. Berryhill, who inherited a life estate therein, and no more.

That subsequent to August 8, 1907, the plaintiff, Daniel A. McDougal, purchased from all of said uncles and aunts all their right, title and interest in and to the lands in controversy, for a valuable consideration, and said uncles and aunts executed and delivered to said Daniel A. McDougal warranty deeds for said land, conveying to and vesting in the said Daniel A. McDougal the fee in and to the said lands with other lands, subject only to the life estate of the father, George Franklin Berryhill, at that time owned by the defendants, Edmond McKay and Perry McKay, the said deeds of conveyance being as follows; to-wit:

Deed from Martha E. Lee Kiefer to Daniel A. McDougal, dated August 20, 1907, the husband of said Martha E. Lee Kiefer joining therein, wherein and whereby she conveyed all her right, title and interest in said land to Daniel A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory in the recording District in which said land is situated.

Deed from Stanford Berryhill to Daniel A. McDougal, dated August 16, 1907, wherein and whereby he conveyed all his right, title and interest in said land to Daniel A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States and Ex-Officio Recorder at Sapulpa, Indian Territory in the Recording District in which said land is situated.

Deed from Columbus Berryhill to Daniel A. McDougal, dated August 21, 1907, wherein and whereby he conveyed all his right, title and interest in said land to Daniel A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory in the Recording District in which said land is situated.

9 Deed from Theodore Berryhill to Daniel A. McDougal, dated August 16, 1907, wherein and whereby he conveyed all his right, title and interest in said land to Daniel A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the Recording District in which said land is situated, and a copy of which deed is attached hereto and marked Exhibit "F" and made a part of this petition.

Deed from William Berryhill to Daniel A. McDougal, dated August 16, 1907, wherein and whereby he conveyed all his right,

title and interest in said land to Daniel A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the Recording District in which said land is situated, and a copy of which deed is attached hereto and marked Exhibit "G" and made a part of this petition.

Deed from Mary Kiefer to D. A. McDougal, dated August 16, 1907, the husband of said Mary Kiefer joining therein, wherein and whereby she conveyed all her right, title and interest in said land to Daniel A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the recording district in which said land is situated, and a copy of which deed is attached hereto and marked Exhibit "H" and made a part of this petition.

Deed from Josie Morton to Daniel A. McDougal, dated August 20, 1907, the husband of said Josie Morton joining therein, wherein and whereby she conveyed all her right, title and interest in said land to Daniel A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the recording district in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "I" and made a part of this petition.

That there was drawn in question the construction of the laws and treaties of the United States and the effect of the act of Congress and treaties between the United States of America and the Creek Nation or Tribe of Indians, as hereinbefore set out, and of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas put in force in the Indian Territory; that it was claimed and contended by the said Daniel A. McDougal, this petitioner, that said Chapter 49 of Mansfield's Digest of the Statutes of Arkansas put in force in the Indian Territory by the Acts of Congress above set forth, became, and was, a law of the United Stated of America; and that it was put in force in the Indian Territory subject to the construction which had theretofore been placed thereupon by the Supreme Court of the State of Arkansas, and that under the said Chapter 49 of the Statutes of Arkansas, and especially under Section 2531 of said Chapter 49, the land above described, which was the allotment of Andrew J. Berryhill, as appears from the record and proceedings, came to him as a new acquisition and not as an ancestral estate; and that upon the death of the said Andrew J. Berryhill without issue, that his father, George Franklin Berryhill, and his mother, Clementine Berryhill, inherited only a life estate in said lands, and that the fee simple to said lands descended to the collateral kindred of the said Andrew J. Berryhill, all of whom have deeded their interest in said lands to this petitioner, Daniel A. McDougal, and that this petitioner was, and is, the owner of the fee simple in said lands, subject to the life estate in the said Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis. That the decision of the Honorable Supreme Court of the

State of Oklahoma was against the contention of this petitioner and against his title claimed under said section 2531 of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, and said decision was to the effect that the allotment of the said Andrew J. Berryhill was an ancestral estate and that his parents inherited the entire fee simple in said lands and that the grantors of this petitioner inherited no right, title or interest therein; all of which is fully apparent in the record and proceedings of the case and is specifically set out in the assignment of errors filed herewith.

Whereupon, petitioner prays that his appeal be allowed and that a transcript of record, proceedings and papers upon which said orders were made, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, District of Columbia, under the rules of said court in such cases made and provided, in order that the same may be inspected and corrected, as ac-
11 cording to law and justice should be done.

MALCOLM E. ROSSER,
WILLIAM S. COCHRAN,
Attorney- for Plaintiff in Error.

Writ of Error allowed this 8 day of Sept. 1914.

[Seal Supreme Court, State of Oklahoma.]

M. J. KANE,
Chief Justice.

Attest:
W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

Filed Oct. 5, 1914. W. H. L. Campbell, Clerk.

12 Filed Oct. 5, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the United States.

DANIEL A. MCDOUGAL, Plaintiff in Error,
vs.
EDMOND MCKAY, PERRY MCKAY, JOHN V. MCKAY, and ALBERT W. SHULTHIS, Defendants in Error.

Assignment of Errors.

Comes now Daniel A. McDougal, plaintiff in error in the above styled cause and for his assignment of errors alleges and states that the Supreme Court of the State of Oklahoma erred to the grievous injury and prejudice of plaintiff in error, in the following particulars, to-wit:

1. The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Tulsa County.

2. The Supreme Court of the State of Oklahoma erred in holding and deciding that under Mansfield's Digest of the Laws of Arkansas,

and particularly chapter forty nine thereof, the allotment of Andrew J. Berryhill was an ancestral estate and not a new acquisition.

3. The Supreme Court of the State of Oklahoma erred in holding and deciding that the father of Andrew J. Berryhill, deceased inherited the fee simple in the lands of said Andrew J. Berryhill deceased upon his death to the exclusion of the collateral kindred of the said Andrew J. Berryhill.

4. The Supreme Court of the State of Oklahoma erred in holding and deciding that the various grantors of the plaintiff in error who were the uncles and aunts of the said Andrew J. Berryhill deceased, did not inherit the fee simple estate in his allotment upon his death and that plaintiff in error acquired no interest in said lands
13 under and by virtue of his deeds from them.

5. The Supreme Court of the State of Oklahoma erred in holding and deciding that the testimony of lawyers to the effect that the decision of the Circuit Court of Appeals in the case of Shulthis vs. McDougal, 170 Fed. 529, had not been followed or acquiesced in by the bar of the State nor by the nisi prius judges, was not admissible in evidence.

5. The Supreme Court of the State of Oklahoma erred in holding and deciding that the decisions in the case of Shulthis vs. McDougal, 170 Fed. 529 and Pigeon vs. Buck, 38 Oklahoma 101 had become a rule of property.

Wherefore for these and other manifest errors appearing on the record in said cause, this petitioner prays that the judgment of the Supreme Court be reversed and that judgment be rendered for this petitioner, establishing his right to the fee simple in lands in said action described together with the rents and royalties in the gas and oil taken therefrom, and for all his costs.

MALCOLM E. ROSSER,
WILLIAM S. COCHRAN,
Attorneys for Plaintiff in Error.

14 (Filed Oct. 5, 1914. W. H. L. Campbell, Clerk.)

In the Supreme Court of the United States.

No. —.

DANIEL A. MCDOUGAL, Plaintiff in Error,
vs.
EDMOND MCKAY, PERRY MCKAY, JOHN V. MCKAY, and ALBERT W. SHULTHIS, Defendants in Error.

Now on this 8 day of September, A. D. 1914, came on to be heard the application of Daniel A. McDougal, plaintiff in error, said plaintiff being represented by counsel, for a writ of error, in the above styled cause; and it appearing to the court from the petition filed herein and the records filed therewith that the application ought to be granted and that the transcript of record and proceedings and

papers upon which the judgment of the court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in the petition in order that such proceedings may be had as will be just in the premises.

It is therefore ordered that the writ of error be allowed upon the plaintiff in error giving bond, as the laws directs, in the sum of Five Hundred & No/100 Dollars, and that a true copy of the record, assignment of errors and all the proceedings had in the case in the Supreme Court of the State of Oklahoma shall be transmitted to the Supreme Court of the United States properly certified, as the law directs, that that court may inspect same and do what according to law should be done.

It is further ordered that a citation issue citing and directing the defendants in error in said case to appear in the Supreme Court of the United States to answer said writ *or* error and assignment of error according to law.

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest.
[SEAL.] W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

Endorsed: No. —. In the Supreme Court of the United States. Daniel A. McDougal, Plaintiff in Error vs. Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, Defendants in Error. Order Granting Writ of Error. Rosser & Cochran, Attorneys for Plaintiff in Error.

15 Filed Oct. 5, 1914. W. H. L. Campbell, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma, before you at the July term A. D. 1914, thereof, being the highest Court of law or equity of the said State in which a decision could be had in said suit, between Daniel A. McDougal, Plaintiff and Plaintiff in Error, and Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, Defendants and Defendants in Error, wherein was drawn in question the construction of a statute of the United States, and the decision was against the right, title, privilege or exemption set up or claimed under such statute, a manifest error has happened, to the great damage of the said Daniel A. McDougal, plaintiff in error as by his complaint appears.

We being willing that error if any hath beeen, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ so that you may have them at Washington on the 2nd day of November next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 3rd day of October, A. D. 1914.

[Seal of the United States District Court, Esatern District of Oklahoma.]

R. P. HARRISON,
Clerk U. S. Dist. Court, East. Dist. of Okla.,
By L. S. TRIMBLE, *Deputy.*

Allowed this 5 day Oct., 1914.

M. J. KANE,
Chief Justice Sup. C't Oklahoma.

16 In the Supreme Court of the United States.

No. —.

DANIEL A. MCDOUGAL, Plaintiff in Error,
vs.
EDMOND MCKAY, PERRY MCKAY, JOHN V. MCKAY, and ALBERT W. SHULTHIS, Defendants in Error.

Know all men by these presents: That we, Daniel A. McDougal, Frank P. Smith and R. B. Thompson are held and firmly bound unto Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis in the just and full sum of Two Thousand Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, firmly by these presents.

Witness our hands and seals this 10 day of September, A. D. 1914.

Whereas, lately at the July term A. D. 1914, of the Supreme Court of the State of Oklahoma, in a suit pending in said Court between Daniel A. McDougal, plaintiff in error, and Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, defendants in error, judgment was rendered against the said plaintiff in error; and the said plaintiff in error has obtained a writ of error of the said Court to reverse said judgment, and a citation directed to the said Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden

at Washington in the District of Columbia not exceeding thirty days from and after the date of the citation in this cause.

Now, the condition of the foregoing obligation is such that if the said plaintiff in error shall prosecute said writ to effect and answer all costs if he fails to make his plea good, then the above
17 obligation to be void; otherwise to be and remain in full force and effect.

DANIEL A. McDOUGAL. [SEAL.]
FRANK P. SMITH. [SEAL.]
R. B. THOMPSON. [SEAL.]

STATE OF OKLAHOMA,
Muskogee County, ss:

Daniel A. McDougal, Frank P. Smith and R. B. Thompson whose names are subscribed to the foregoing bond as obligors, being severally and duly sworn each for himself says: That he is a resident and freeholder of the State of Oklahoma and that he is worth the sum of Three Thousand Dollars above all his just debts and liabilities, in property not exempt by law from execution.

DANIEL A. McDOUGAL.
FRANK P. SMITH.
R. B. THOMPSON.

Subscribed and sworn to before me this 10 day of September A. D. 1914.

[SEAL.] GEORGIA ROUNDS,
Notary Public.

My Commission expires May 18, 1918.

The foregoing bond is approved this 12 day of September A. D. 1914.

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Endorsed: No. 6372. In the Supreme Court of the United States. Daniel A. McDougal, Plaintiff in Error vs. Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, Defendants in Error. Bond. Received Sep. 12, 1914. W. H. L. Campbell, Clerk. Rosser & Cochran, Attorneys for Plaintiff in Error.

18 Filed May 5, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6372.

D. A. McDougal, Plaintiff in Error,
vs.
Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, Defendants in Error.

Petition in Error.

The said D. A. McDougal, Plaintiff in Error, complains of the said Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, Defendants in Error, for that the said defendants in Error, on the 10th day of March, A. D. 1914, at the March term of the District Court of Tulsa County, State of Oklahoma, recovered a judgment by the consideration of said court, against the said D. A. McDougal in a certain action then pending in the said court wherein the said D. A. McDougal was plaintiff and the said Edmond McKay, Perry McKay, John V. McKay, and Albert W. Shulthis were defendants. The original case made in said case, duly certified and attested, is hereunto attached, and marked "Exhibit A" and made a part of this petition in error; and the said D. A. McDougal alleges that there is error in the said record and proceedings in this, to-wit:

I.

The Court erred in excluding the deposition of N. A. Gibson, taken on the 5th day of March, A. D. 1914 and offered in evidence at the trial in this case.

II.

The Court erred in excluding the deposition of Mr. J. C. Stone, taken on the 5th day of March, A. D. 1914, and offered in
19 evidence at the trial in this case.

III.

The court erred in excluding the deposition of Mr. Guy L. Andrews offered in evidence at the trial in this case.

IV.

The court erred in excluding the deposition of Gene P. Day offered in evidence at the trial in this case.

V.

The court erred in excluding the testimony of Mr. Gray Carroll offered at the trial of the case.

VI.

The court erred in excluding the testimony of Messrs. C. S. Walker, D. B. Hughes, A. J. Biddison, Harry Campbell, Frank P. Smith, J. F. Lawrence and L. O. Lytle.

VII.

The court erred in excluding the exhibits to the deposition of Mr. N. A. Gibson offered in evidence at the trial.

VIII.

The court erred in excluding the evidence offered by the plaintiff to the effect that some of the District Judges and some of the County Judges of the State had refused to follow the decision of the Circuit Court of Appeals in the case of Shulthis vs. McDougal reported in 170 Fed. Reporter 529.

IX.

The court erred in rendering judgment for the defendants.

X.

The court erred in holding that the allotment of the deceased allottee, Andrew J. Berryhill, was an ancestral estate and not a new acquisition.

20 XI.

The court erred in holding that the fee simple estate in the land in controversy was inherited by George Franklin Berryhill and Clementine Berryhill, father and mother respectively of Andrew J. Berryhill, deceased; and erred in refusing to hold that they only inherited a life estate in the land.

XII.

The court erred in over-ruling the motion of the plaintiff in error for a new trial.

Wherefore, the plaintiff in error prays that said judgment so rendered may be set aside and held for naught and that a judgment may be rendered in favor of the plaintiff in error and against the defendants in error upon the pleadings and agreed statement of facts appearing in the record of this case, and for all proper relief.

D. A. McDOUGAL,
Plaintiff in Error,
By ROSSER & COCHRAN,
His Attorneys.

21 [Endorsement:] No. —. In the Supreme Court of the State of Oklahoma. D. A. McDougal, Plaintiff in Error, vs. Edmond McKay, Perry McKay, John V. McKay and Albert W. Schulthis, Defendants in Error. Petition in Error. Ros-
22 & 23 ser and Cochran, Attorneys for Plaintiff in Error. District Court, State of Oklahoma, County of Tulsa. Filed April 8th, 1914. W. W. Stuckey, Clerk. Filed May 5-1914. W. H. L. Campbell, Clerk.

24 In the District Court of Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDougal, Plaintiff,
vs.
Edmond McKay, Perry McKay, John V. McKay, and Albert W. Schulthis, Defendants.

Case-Made.

Be it remembered, That the plaintiff, D. A. McDougal, commenced his action against the defendants Edmond McKay, Perry McKay, John V. McKay and Albert W. Schulthis by filing his petition against said Defendants in the district court within and for the County of Tulsa, State of Oklahoma, on the 5th day of April, 1913, which said petition is in the words and figures following, to-wit:

25 No. 3528.

D. A. McDougal, Plaintiff,
vs.
Edmond McKay, Perry McKay, John V. McKay, and Albert Schulthis, Defendants.

Petition.

Comes the plaintiff, D. A. McDougal, and for his cause of action against the defendants Edmond McKay, Perry McKay, John V. McKay, and Albert W. Schulthis, states and shows to the court:

I.

That D. A. McDougal is a citizen and resident of the State of Oklahoma; that the defendants Edmond McKay and Perry McKay are also citizens and residents of the State of Oklahoma; that the defendant John V. McKay is a citizen and resident of the state of Missouri; and that the defendant Albert W. Schulthis is a citizen and resident of the State of Kansas; and that the lands hereinafter described are situated within the County of Tulsa, in said State of Oklahoma.

II.

That the plaintiff D. A. McDougal is the owner of the fee to the following described real estate situated in the County of Tulsa and State of Oklahoma, to-wit:

26 The East Half of the Northwest Quarter of the Northeast Quarter and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section Thirteen (13), Township Seventeen (17), North, Range Twelve (12), East, containing, Thirty (30) acres more or less according to the United States Survey thereof, subject only to a life estate in the defendants Edmond McKay, Perry McKay and John V. McKay as hereinafter more particularly set forth.

III.

That the lands hereinbefore described are within proven oil and gas producing territory, and that both oil and gas are now being produced therefrom as hereinafter more particularly set out.

IV.

That the lands and premises hereinbefore mentioned and described are now in the possession of the defendants Edmond McKay, Perry McKay and John V. McKay, and the defendant Albert W. Schulthis has entered thereon and had drilled wells thereon for the production of oil and gas, and is proceeding to drill other wells thereon for the production of oil and gas or oil or gas, and that said development by the defendant Schulthis has been done and is being done, as plaintiff is informed and believes, by, under and with the consent of the defendants Edmond McKay, Perry McKay and John V. McKay.

V.

That plaintiff derives his title to the said lands as follows:

That on, to-wit: the 8th day of March, 1900 there was negotiated by and between the Commission to the Five Civilized Tribes consisting at that time, of Henry L. Dawes, Tams Bixby, Archibald S. McKennon and Thomas B. Needles, and certain commissioners on behalf of the Muskogee or Creek Tribe of Indians in Indian Territory, to-wit: Pleasant Porter, George A. Alexander, David M.

27 Hodge, Isparhecher, Albert P. McKellop, and Cub McIntosh, a certain agreement providing for a general allotment, in severalty, of the lands of said Muskogee or Creek Tribe of Indians, which said agreement or treaty was afterwards enacted into a law by the Congress of the United States, by an act of Congress entitled "An Act to Ratify and Confirm an Agrr-ment with the Muskogee or Creek Tribe of Indians, and for other purposes" approved March 1, 1901, and ratified by the Creek National Council May 25, 1901; and by Section three of said act it was provided that all lands of said tribe except as therein provided, should be allotted among the citizens of the tribe, by said Commission, so as to give each an equal share of the whole, in value, as nearly as may be, in manner in said

act provided; which said act appears in 31 United States Statutes at Large, 861. That thereafter a certain agreement supplemental to said last recited agreement and act of Congress, was Negotiated between the Commission to the Five Civilized Tribes consisting of Henry L. Dawes, Tams Bixby, Thomas B. Needles and Clifton R. Breckenridge, and certain commissioners of the Muskogee of Creek Tribe of Indians in Indian Territory, to-wit: Pleasant Porter, Roley McIntosh, Thomas W. Perryman, Amos McIntosh, and David M. Hodge, which said supplemental agreement was enacted into law by the Congress of the United States by an act entitled "An act to Ratify and Confirm a Supplemental agreement with the Creek Tribe of Indians and for other purposes" approved June 20, 1902, and appears in 32 Statutes at Large, 500, and by proclamation of the President as therein provided, became operative August 8, A. D. 1902; that by Section six of said last named act it was provided:

28 "The provisions of the act of Congress, approved March 1, 1901 (31 Stat. L. 861) insofar as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory; Provided, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation; and provided further, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49".

And by Section Seven of said act it was further provided:

"All children born to those citizens who are entitled to enrollment as provided by the Act of Congress approved March 1, 1901 (31 Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

That by Section Twenty of said act, it was further provided:

"This agreement is intended to modify and supplement the agreement ratified by said act of Congress approved March 1, 1901, and shall be held to repeal any provision in that agreement, or in any prior agreement, treaty or law in conflict therewith."

That Chapter 49 of Mansfield's Digest, entitled Descents and Distributions, as referred to in said act of Congress and as adopted and put in force in the Creek Nation of the Indian Territory and which thereby became a law of the United States, provided as follows:

"SECTION 2522. When any person shall die, having title to any real estate of inheritance, or personal estate (*b*), not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed in parcenary, to his

kindred, male and female, subject to the payment of his debts and the widow's dower in the following manner:

First: To children or their descendants, in equal parts.

Second: If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

29 Third: If there be no children or their descendants, father, mother, brothers or sisters, not their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants in equal parts.

* * * * * * *

"SEC. 2531. In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend, in remainder to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother for her lifetime; then to descend to the collateral heirs as before provided. *(d)*"

That in the month of May, A. D., 1901, there was born to one George Franklin Berryhill and Clementine Berryhill, husband and wife, a son, who was named Andrew J. Berryhill; that said George Franklin Berryhill is, and at all the times mentioned in the petition was, a Creek Indian and a citizen of the Creek Nation, duly enrolled as such by the Commission to the Five Civilized Tribes as a citizen by blood, and his name appears upon the rolls of said Commission as a mixed blood Indian and not a full blood; that said Clementine Berryhill, wife and mother, is not and at no time has been a citizen of the Creek Nation; that said Andrew J. Berryhill departed this life in the month of November, 1901, intestate and unmarried, leaving no brothers or sisters surviving him, that thereafter and on or about the 8th day of October, A. D., 1902 the name of said Andrew J. Berryhill was duly placed upon the tribal rolls of the Creek Nation as a citizen thereof by the Commission to the Five Civilized Tribes, and this enrollment as such citizen was approved by the Secretary of the Interior on November 14, 1902; that on the — day of —— in the year 1904 the Commission to the Five Civilized Tribes set apart and allotted to said Andrew J. Berryhill deceased, the lands described in this petition with other lands, and that on or

30 about October 10, 1905 the United States of America together with the Creek Nation, did through their legal representatives, execute a deed or patent to said lands, and the Principal Chief of the Creek Nation, P. Porter, on behalf of the Creek Nation, did, on or about October 10, 1905, execute deed or patent covering and describing said lands, which was subsequently approved by the Secretary of the Interior in behalf of the United States of America, confirming the title in and to said lands in the heirs of Andrew J. Berryhill deceased, which said patent was afterwards and in the year 1905

filed with the Commission to the Five Civilized Tribes and recorded in the records in the office of the Commission to the Five Civilized Tribes as required by law.

That on the 5th day of June, 1906, the said George Franklin Berryhill and Clementine Berryhill, father and mother of Andrew J. Berryhill, deceased, executed and delivered to the defendants Edmond McKay and Perry McKay, a warranty deed, whereby they did grant, bargain, sell and convey unto the said Edmond and Perry McKay all their right, title and interest in and to the lands in this petition hereinbefore described, which deed was duly filed for record in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, and a copy of which deed is hereto attached and marked Exhibit "A" and made a part of this petition; and that by said deed there was conveyed to the said Edmond and Perry McKay a life estate only and no more in and to the lands and premises hereinbefore described.

That thereafter and on to-wit, the 9th day of August, A. D. 1910, the said Edmond and Perry McKay, joining with them their
31 wives Florence McKay and Gusta McKay, executed and delivered to John V. McKay a deed of conveyance of an undivided one-third interest in whatever right they had in the lands hereinbefore described, which the plaintiff avers was a life estate only and no more, which said deed was filed for record and now appears of record in the office of the Register of Deeds in and for Tulsa County, Oklahoma, in Record Book 128 at page 342, and a copy of which deed is attached hereto, marked Exhibit "B" and made a part of this petition; and that by said deed the defendant John V. McKay became the owner of an undivided one-third interest in and to a life estate only in the lands hereinbefore described and no more.

That Andrew J. Berryhill deceased left surviving him the following uncles and aunts, Martha E. Lee Kiefer, Stanford Berryhill, Comumbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and Josie Morton; and that said uncles and aunts inherited the fee in the land hereinbefore described, subject only to a life estate in the father George Franklin Berryhill, under the provisions of said Chapter 49 of Mansfield's Digest of the laws of Arkansas put in force as heretofore alleged and as hereinbefore set out; and that no person or persons other than said uncles and aunts inherited any right, title or interest in or to said lands, and that the only person other than said uncles and aunts who inherited any right or interest therein was the said George Franklin Berryhill, the father of Andrew J. Berryhill, who inherited a life estate therein and no more.

That subsequent to August 8, 1907, the plaintiff D. A. McDougal purchased from all of said uncles and aunts all their right, title and interest in and to the lands in controversy, for a valuable con-
32 sideration and said uncles and aunts executed and delivered to said D. A. McDougal warranty deeds for said land, conveying to and vesting in the said D. A. McDougal the fee in and to the said lands with other lands, subject only to the life estate of the father George Franklin Berryhill, at that time owned by the defend-

ants Edmond and Perry McKay, the said deeds of conveyance being as follows: to-wit:

Deed from Martha E. Lee Kiefer to D. A. McDougal, dated August 20, 1907, the husband of said Martha E. Lee Kiefer joining therein, wherein and whereby she conveyed all her right, title and interest in said land to D. A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the recording District in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "C" and made a part of this petition.

Deed from Stanford Berrybill to D. A. McDougal, dated August 14, 1907, wherein and whereby he conveyed all his right, title and interest in said land to D. A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory in the recording District in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "D" and made a part of this petition.

Deed from Columbus Berryhill to D. A. McDougal, dated August 21, 1907, wherein and whereby he conveyed all his right, title and interest in said land to D. A. McDougal, which deed was duly
33 filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory in the Recording District in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "E" and made a part of this petition.

Deed from Theodore Berryhill to D. A. McDougal, dated August 16, 1907, wherein and whereby he conveyed all his right, title and interest in said land to D. A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory in the Recording District in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "F" and made a part of this petition.

Deed from William Berryhill to D. A. McDougal, dated August 16, 1907, wherein and whereby he conveyed all his right, title and interest in said land to D. A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the Recording District in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "G" and made a part of this petition.

Deed from Mary Kiefer to D. A. McDougal, Dated August 16, 1907 the husband of said Mary Kiefer joining therein, wherein and whereby she conveyed all her right, title and interest in said land to D. A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the Recording
34 District in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "H" and made a part of this petition.

Deed from Josie Morton to D. A. McDougal, dated August 20, 1907, the husband of said Josie Morton joining therein, wherein and whereby she conveyed all her right, title and interest in said land to D. A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the Recording District in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "I" and made a part of this petition.

And that by virtue of said several conveyances from the uncles and aunts of Andrew J. Berryhill deceased, the plaintiff D. A. McDougal became vested with and is now the owner of the fee title to the lands and premises hereinbefore mentioned and described, subject only to a life estate in the defendants Edmond McKay, Perry McKay and John V. McKay; and that no other person or persons has or have any right, title, interest or estate whatsoever in or to said lands or any part thereof, and that the oil and gas in and under said lands is owned by and is the property of the said D. A. McDougal and no other person or persons.

VI.

That the plaintiff D. A. McDougal is the owner of all the oil and gas in and under the lands hereinbefore mentioned and described and that he has never at any time executed or joined in any sale, conveyance or lease of the oil and gas in and under said lands, and that he has not by lease, conveyance, contract or otherwise, authorized any person or persons or corporation to prospect said lands for oil and gas or oil or gas or to drill any wells thereon for the production of oil and gas or oil or gas therefrom, and that the prospecting and drilling upon said lands as hereinafter set out and the production of oil and gas therefrom, is wholly without hes consent and without any authority, contract or agreement with or from him the said D. A. McDougal, and is in violation of his rights in said premises, and constitutes a continuing trespass thereon, and constitues wa-te and a diminution of his estate, and will, unless his rights are protected by appropriate orders of this Honorable Court, work him great and irreparable injury, and that he has no adequate remedy at law for the protection of his rights in the premises and unless granted relief by a court of equity, will be wholly remediless.

VII.

That the defendant Albert W. Shulthis has entered upon the lands and premises hereinbefore mentioned and described, without any right or authority from the plaintiff D. A. McDougal and without any right or authority whatsoever, and has proceeded to drill thereon one well which is producing oil, and from which the said Albert W. Shulthis is now and has for some time past been producing oil in large quantities and of great value, but the precise amount and

value thereof the plaintiff is unable to state, and has also drilled a certain other well upon said premises which is producing gas and from which the said defendant Albert W. Shulthis has produced and is now producing large quantities of gas of great value but the precise amount and value thereof this plaintiff is unable to state, and is proceeding to drill another well upon said premised for the purpose of producing oil and gas or oil or gas therefrom, and threatens that he will drill other and further wells and will produce therefrom oil and gas or oil or gas; and that the oil and gas so being mined and produced on said land is being sold and
36 disposed of by him the said Albert W. Shulthis and the proceeds thereof converted by the said Albert W. Shulthis and his co-defendants Edmond McKay and Perry McKay and John V. McKay to their own use without in any manner accounting to this plaintiff for any part thereof, and that said defendants are so producing said oil, selling the same and converting the proceeds thereof to their own use without any right in them or either of them to so produce said oil and without any title thereto and without the consent of the plaintiff D. A. McDougal, and that the plaintiff D. A. McDougal is the sole and exclusive owner of all the oil so produced or that may be so produced by said defendants from said premises; that plaintiff is informed and believes and avers the fact to be that the defendant Albert W. Shulthis has entered upon said premises and is mining the same for oil and gas and producing oil and gas therefrom under and by virtue of a purported lease contract with his co-defendants Edmond McKay and Perry McKay and John V. McKay, but that the plaintiff D. A. McDougal has not signed said contract and has not a copy thereof and is unable to set forth in this petition the precise terms and conditions of said purported lease contract.

VIII.

That the entry upon said lands and premised by Albert W. Shulthis and the mining of the same for oil and gas and the drilling of the wells thereon and the production of oil and gas therefrom as in the last preceding paragraph of this petition alleged and set out, is, as plaintiff is informed and believes and as plaintiff charges the fact to be, under the false claim that the father of Andrew J. Berryhill deceased, George Franklin Berryhill, inherited the title to the lands and premises hereinbefore described, in fee
37 simple absolute with power of conveyance of the same, and that by virtue of the conveyance from George Franklin Berryhill to Edmond and Perry McKay and the subsequent conveyance by Edmond and Perry McKay to John V. McKay, said defendants Edmond and Perry McKay and John V. McKay became vested with the title to said lands and premises in fee simple absolute, and that said defendants Edmond and Perry and John V. McKay are vested with title to the oil and gas therein and thereunder, and have a right to make and execute a valid lease for oil and gas mining purposes, upon the lands and premises hereinbefore

mentioned and described, that Albert W. Shulthis, under and by virtue of his pretended lease contract with said Edmond, Perry and John V. McKay has the right to enter upon said lands and to prospect thereon for oil and gas and to drill wells thereon and to mine the same for oil and gas and to produce oil and gas therefrom and to sell and dispose of the same, and that the said defendant Albert W. Shulthis with his co-defendants Edmond McKay, Perry McKay and John V. McKay, are entitled to the proceeds arising and accruing from the oil and gas so mined and produced from said lands, but that the claim of said defendants is wholly without right, and that tha plaintiff D. A. McDougal and no other person is entitled to said oil and gas and to the proceeds arising and accruing from the sale and disposition thereof.

IX.

That the title of the plaintiff D. A. McDougal to the lands and premises in controversy in this action and the claim of the defendants Albert W. Shulthis, Edmond McKay, Perry McKay and John V. McKay, is dependent upon the construction of the laws and treaties of the United States and upon the effect of the
38 acts of Congress and treaties between the United States of America and the Creek Nation or Tribe of Indians, as hereinbefore set out, and of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas adopted and put in force in Indian Territory, and which thereby became a law of the United States of America, it being the contention of the plaintiff in this case that the true construction of said laws and treaties and of said Chapter 49 of the Statutes of Arkansas, adopted and put in force in the Indian Territory and in the Creek Nation thereof hereinbefore pleaded, created a life estate only in George Franklin Berryhill, the father of Andrew J. Berryhill deceased, and that the fee title to said lands, subject only to said life estate, vested in the uncles and aunts of Andrew J. Berryhill Deceased hereinbefore mentioned and that under and by virtue of the Creek Supplement Agreement hereinbefore avverred and pleaded and chapter 49 of Mansfield's Digest of the Statutes of Arkansas, entitled "De-cents and Distributions" hereinbefore averred and pleaded, George Franklin Berryhill took a life estate only in the lands and premises hereinbefore mentioned and described and no more, and that the uncles and aunts of Andrew J. Berryhill deceased, to-wit, Martha E. Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and Josie Morton, inherited the fee title to said lands, subject only to the life estate of said George Franklin Berryhill, Clementine Berryhill, mother of said Andrew J. Berryhill deceased being a non-citizen of the Creek Nation and expressly excluded by Section Six of the Creek Supplemental Agreement from
39 any share of inheritance whatsoever in said lands or any part thereof, and it being the contention on the part of the defendants herein that by said laws and treaties of the United States and said Chapter 49 of Mansfield's Digest of the Statutes

of Arkansas, entitled "De-cents and Distributions" adopted and put in force in the Indian Territory and in the Creek Nation thereof, and thereby made a law of the United States, the lands and premised hereinbefore mentioned and described descended in fee simple absolute to George Franklin Berryhill, the father of Andrew J. Berryhill deceased, and that the uncles and aunts of George Franklin Berryhill deceased hereinbefore named took no share or estate whatsoever in or to said lands and premises, and the plaintiff avers and pleads that the rights of the respective parties to this suit are wholly dependent upon the true interpretation and construction of the said laws and treaties of the United States hereinbefore specifically averred and pleaded, including Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, which, by adoption, became a law of the United States with reference to the descent and distribution of the lands of the Creek Nation, and the plaintiff D. A. McDougal specially avers and pleads that the true intent, meaning and interpretation of said laws and treaties created and vested in George Franklin Berryhill, the father of Andrew J. Berryhill, deceased, a life estate only in said lands and no more, and that the uncles and aunts of Andrew J. Berryhill deceased hereinbefore named, inherited the fee title to said lands, subject only to a life estate in said George Franklin Berryhill, and that his grantees, Edmond and Perry McKay took by their deed from him an estate for the life of said George Franklin Berryhill only and no more, and that neither of the defendants herein has any other or greater estate in said premised than a life estate only, for and during the life of George Franklin Berryhill.

Premises considered, Plaintiff prays:

First. That the defendants be required to answer, but not under oath, answer under oath being hereby expressly waived, the precise nature of the contract under which the defendant Albert W. Shulthis is proceeding to prospect for and mine oil and gas upon the lands and premises hereinbefore described, and whether his contract with his co-defendants Edmond McKay, Perry McKay and John V. McKay is verbal or in writing, and if in writing, to set forth a copy thereof, and that defendants be required to render a full and true account of all the oil and gas or oil or gas by them or either of them mined and produced from the premised described in this petition, and what sale or other disposition they have made of the same, and what amount they have received as the proceeds of the sale of the same, and what amount of oil is now on hand in storage or in pipe lines, and what amount of oil has been mined and produced and sold, the proceeds of which have not been collected and received by them, and from what person or persons, corporation or corporations, moneys are due and owing them or either of them for oil mined and produced from said premises, and in what amount; answer under oath as to all of said matters and things being hereby expressly waived.

Second. That a Receiver be appointed to take charge of all the wells now on said land or being drilled thereon and all the machinery, tools, implements and appliances now used in and upon said

premises for the mining and production of oil from said premises and all the oil that has been produced from said premises and remains undisposed of and all the oil that may continue to be produced from said premises during the continuance of this suit, from any wells already on the same which are producing oil, and
41 also of any wells which are producing gas, and to sell and dispose of any oil or gas from producing wells on said premises, and hold the proceeds thereof subject to the final order and disposition of this court, and to collect and receive the proceeds of any oil that has been produced from said premises and sold to other persons, the price of which has not already been paid over to and received by the defendants herein or some of them, and to sell and dispose of any oil that may now be in the pipe lines or in storage that has been produced from said premises, and to manage, control and preserve said property during the pendency of this litigation, and to hold all the funds arising from the sale and disposition of any oil or gas or the collection of any sums due for oil and gas already sold and disposed of, subject to the final orders and disposition of this court.

Third. That during the pendency of this litigation, the defendants and each of them be enjoined and restrained from drilling further wells or further prospecting and mining for oil or gas or oil and gas, upon the lands and premises hereinbefore mentioned and described, or any part thereof, and from selling any oil and gas mined and produced therefrom, or collecting or receiving the proceeds of any oil and gas at any time mined and produced from said premises; and that upon final decree herein, said injunction be made perpetual.

Fourth. That this court adjudge and decree that the plaintiff D. A. McDougal is the owner of the lands and premises mentioned and described in this petition subject only to a life estate therein in the defendants Edmond McKay and Perry McKay and John V. McKay, for and during the life of George Franklin Berryhill and no longer, and that his title be quieted and the defendants and all of their servants, agents and employees and all persons acting
42 by, through or under any of them or under color of any authority from them, be perpetually enjoined from setting up or claiming any right, title, or interest in or to the oil and gas in or under said lands and premised or mined and produced therefrom, or from asserting any right or title in said premises other than a life estate for the life of George Franklin Berryhill only, and that it be further adjudged and decreed that plaintiff D. A. McDougal is entitled to all the oil and gas heretofore produced from said premises and all the oil and gas or oil or gas hereafter produced from any wells drilled upon the said premises by the defendants or either of them, and that said D. A. McDougal is entitled to continue to produce oil and gas from any wells so drilled upon said premises by the defendants or either of them, and to market the oil therefrom and sell and dispose of the same and collect and receive the proceeds therefrom.

Fifth. That defendants be required to account fully for all of the oil at any time taken by them or either of them from said premises, and all of the gas so taken by them or either of them and *and* received and marketed to their own use, and that the amount *g*hereof be by decree of this Court ascertained and a judgment rendered in favor of the plaintiff D. A. McDougal and against the defendants Albert W. Shulthis, Edmond McKay, Perry McKay and John V. McKay, for the amount so found by the Court, and for all of his costs in this behalf laid out and expended.

Sixth. That the court make all such other and further orders and enter such other and further decree in the premises as the
43 facts may warrant and the Court shall in equity and good conscience deem proper.

P. C. WEST,
Attorney for Plaintiff.

STATE OF OKLAHOMA,
County of Creek, ss:

I, D. A. McDougal, having been first duly sworn, upon oath state: That I am the plaintiff in the foregoing action; that I have read the foregoing petition, and that the matters and things set forth in said petition are true.

D. A. McDOUGAL.

Subscribed and sworn to before me this 5 day of April, 1913.

[Seal of District Court of Tulsa County, Oklahoma.]

W. W. STUCKEY,
District Clerk.
By J. A. LASWELL.

44 EXHIBIT "A."

General Warranty Deed.

(With Relinquishment of Dower.)

This indenture made and entered into this 5th day of June, one thousand, nine hundred and six by and between George F. Berryhill and Clementine Berryhill, his wife, of Sapulpa, I. T., party of the first part, and Edmond McKay and Perry McKay of Bixby I. T., parties of the second part.

Witnesseth:

That the said parties of the first part, for and in consideration of the sum of Two Thousand and no/100 Dollars, in hand paid the receipt of which is hereby acknowledged, do*es* hereby grant, bargain, sell, convey and confirm unto the said parties of the second part the following described real estate and premises situate in the Muskogee or Creek Nation, and within the limits of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, the east half of the northwest quarter of the northeast quarter and the southwest quarter of the northwest quarter of the northeast quarter of Section 13, Township 17 North, and Range 12 East, of the Indian Base and Meridian, in the Ind. Ter., containing 70 acres more or less.

the above described land being a part of the allotment of Andrew J. Berryhill our deceased son. Said Andrew J. Berryhill died about October 1st 1901. We being the sole and only heirs of said Andrew J. Berryhill, deceased, together with all the improvements thereon, and the appurtenances and immunities thereunto belonging or in any wise appertaining thereto.

To have and to hold The aforesaid premises to the said Edmond McKay & Perry McKay and unto their heirs and successors in fee simple forever; and we the said George F. Berryhill and
45 Clementine Berryhill for ourselves and our heirs, executors and administrators do covenant with the said Edmond McKay and Perry McKay and their heirs, successors and assigns, that we are lawfully seized in fee of the aforegranted premises; that they are free from all incumbrances; that we have good right to sell and convey the same to the said Edmond McKay & Perry McKay as aforesaid; and that we will and our successors, heirs, executors and administrators shall warrant and defend the same to the said Edmond McKay & Perry McKay and their heirs, successors and assigns forever, against the lawful claims and demands of all persons.

And I, Clamantine Berryhill of Sapulpa, I. T., wife of the said George F. Berryhill, for and in consideration of the said sum of money, do hereby release and relinquish unto the said parties of the second part all my right and dower and himestead in and to the said lands.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

his
GEORGE F. x BERRYHILL. [SEAL.]
mark.
CLEMENTINE BERRYHILL. [SEAL.]

Witness to mark:

LAFE SPEER.
AL CAYMOD.

UNITED STATES OF AMERICA,
Indian Territory,
Western Judicial District:

Be it remembered, That on this day came before me, the undersigned, a Notary Public in and for the Western Judicial District of the Indian Territory, aforesaid, duly commissioned and acting as such George F. Berrynill and Clementine Berryhill, his wife,
46 to me personally well known as the persons whose names appear in the within and foregoing deed of conveyance, as one

of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on the same day also voluntarily appeared before me, the said Clementine Berryhill, wife of said George F. Berryhill, to me well known to be the person whose name appears upon the within and foregoing deed, and in the absence of her said husband, declared that she had of her own free will, executed said deed, and signed and sealed the relinquishment of dower and homestead in the foregoing deed, for the consideration and purposes therein contained and set forth, and without compulsion or undue influence of her said husband.

47 EXHIBIT "B."

Quit Claim Deed.

This identure made on the 19th day of Aug. A. D. One Thousand Nine Hundred and Ten by and between Edmond McKay and Perry McKay of the Counties of Muskogee and Tulsa, and State of Oklahoma, parties of the first part, and John V. McKay, of the County of Knox and State of Missouri, party of the second part.

Witnesseth That said parties of the first part, in consideration of the sum of Seven Hundred Dollars and other considerations to them paid by the party of the second part, the receipt of which is hereby acknowledged, do by these presents, remise, release, and forever quit claim unto the said party of the second part, the following described lots, tracts, or parcels of lands, lying, being and situated in the Counties of Creek and Tulsa, and State of Oklahoma, to-wit:

Undivided one third of the North East one fourth (¼) of Northwest fourth (¼) of Section Eighteen (18) and East one half (½) of North West one fourth (¼) of North East one fourth (¼) and the South West One fourth (¼) of the Northwest one fourth (¼) of the North East one fourth (¼) of Section Thirteen (13) all in Township Seventeen (17) North, Range Twelve (12) East.

To have and to hold the same, with all the rights, immunities, privileges and appurtenances thereunto belonging unto the said party of the second part, and his heirs and assigns, Forever: so that neither the said parties of the first part, nor their heirs, nor any person or persons for them in their names or behalf, shall or will hereafter claim or demand any right or title to the aforesaid premises, or any part thereof, but they and every one of them shall, by these presents, be excluded, and forever barred.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above
48 written.

Signed, Sealed and delivered in our presence and witnessed by us:

EDMOND McKAY. [SEAL.]
FLORENCE McKAY. [SEAL.]
PERRY McKAY. [SEAL.]
GUSTA McKAY. [SEAL.]

STATE OF MISSOURI,
County of Knox, ss:

On this 19th day of August, 1910, before me personally appeared Edmond McKay and Florence McKay his wife and Perry McKay and Gusta McKay his wife to me known to be the persons described and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Knox City, Missouri, the day and year first above written.

[SEAL.] ALEX B. ANDERSON,
Notary Public.

My term as Notary Public will expire April 10th, 1912.

Filed for record in Tulsa County, Tulsa, Okla., June 18, 1912, at 4.30 o'clock P. M.

[SEAL.] H. C. WALKLEY,
Register of Deeds.

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, Lewis Cline, Register of Deeds in and for the above named County and State, do hereby certify that the within and foregoing instrument is a true and correct copy of a like instrument now of record in this office, and recorded in Book 128, page 342.

Dated this 4th day of April, A. D. 1913.

[SEAL.] LEWIS CLINE,
Register of Deeds.

49 EXHIBIT C.

Know all men by these presents:

That we, Martha E. Lee Kiefer, and Smith Kiefer, her husband, of Kiefer, Western District, Indian Territory, for and in consideration of the sum of One Hundred Dollars ($100.00 (*Dollars*) cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns, forever, all our right, title, claim and interest, in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, Township 17 North, Range 12 East, and the Southwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East half of the Northwest Quarter of the Northeast Quarter, and the southwest quarter of the northwest quarter of the Northeast Quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased,

with all the improvements and privileges and appurtenances thereunto belinging or in any wise appertaining.

To have and to hold the aforegranted premises to the said D. A. McDougal, his heirs and assigns, forever, And we covenant with the said D. A. McDougal that we will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by us, but no further or otherwise.

In witness whereof, we the said Martha E. Lee Kiefer, and husband, Smith Kiefer, have hereunto set our hands and seals this the 20 day of August, 1907.

[SEAL.] MARTHA E. LEE KIEFER.
[SEAL.] SMITH KIEFER.

50 UNITED STATES OF AMERICA,
Western District of Indian Territory:

On this 20th day of August, 1907, before me, T. J. Sullivan, a Notary Public, within and for the Western District of the Indian Territory, appeared in person, Smith Kiefer, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me, Martha E. Lee Kiefer, wife of the said Smith Kiefer, to me well known to be the person whose name appears upon the within and foregoing deed, and in the absence of her said husband, declared that she had of her own free will executed the same, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In Testimony Whereof, I have hereunto set my hand as such Notary Public, at —— in said District and Territory, on the 20th day of August, 1907.

[SEAL.] T. J. SULLIVAN,
Notary Public.

My commission expires April 8, 1911.

51 EXHIBIT "D."

Know All Men by These Presents:

That I, Stanford Berryhill of Kiefer, Western District, Indian Territory, for and in consideration of the sum of one hundred ($100.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns, forever all my right, title, claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18,

Township 17 North, Range 12 East, and the Southwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the North West Quarter of the Northeast Quarter and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew Berryhill, deceased, with all the improvements, privileges and appurtenances thereunto belonging or in any wise appertaining.

To Have and To Hold the aforegranted premises to the said D. A. McDougal his heirs and assigns forever. And I covenant with the said D. A. McDougal that I will warrant and defend the title to the aforegranted premises against the lawful claim of all persons claiming under, through or by me, but no further or otherwise.

And for the considerations aforesaid and for divers other good and valuable considerations, I Nannie Berryhill, wife of the said Stanford Berryhill, do hereby release and quit claim unto the said D. A. McDougal, his heirs and assigns, all my right, claim or possibility of dower in or to the aforegranted premises.

In Witness Whereof, we the said Stanford Berryhill and wife Nannie Berryhill, have hereunto set our hands and seals
52 this the —— day of August, 1907.

STANFORD BERRYHILL. [SEAL.]
NANNIE BERRYHILL. [SEAL.]

UNITED STATES OF AMERICA,
Western District, Indian Territory:

On this — day of August, 1907, before me, M. Lee Dudley a Notary Public, within and for the Western District of the Indian Territory, appeared in person Stanford Berryhill, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me, Nannie Berryhill, wife of the said Stanford Berryhill, to me well known to be the person whose name appears upon the within and foregoing deed, and, in the absence of her said husband, declared that she had of her own free will signed the relinquishment of dower therein expressed, for the purposes therein contained and set forth without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public, at Kiefer, in said District and Territory, on the 16th day of August, 1907.

[SEAL.] M. LEE DUDLEY,
Notary Public.

My commission expires January 11, 1908.

53 EXHIBIT "E."

Know All Men by These Presents:

That I, Columbus Berryhill, of Stone Bluff, Western District, Indian Territory, for and in consideration of the sum of One Hundred Dollars, cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all my right, title, claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, Township 17, North, Range 12 East, and the Sourhwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East half of the Northwest Quarter of the Northeast Quarter and the Southwest Quarter of the Northwest Quarter of the Northeast quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased.

With all the improvements and privileges and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the aforegranted premises to the said D. A. McDougal, his heirs and assigns forever. And I covenant with the said D. A. McDougal that I will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by me, but no further or otherwise.

And for the considerations aforesaid and for divers other good and valuable considerations, I, Emma Berryhill, wife of the said Columbus Berryhill, do hereby release and quit claim unto the said D. A. McDougal, his heirs and assigns, all my right, claim or possibility of dower in or to the aforegranted premises.

54 In Witness Whereof, we the said Columbus Berryhill and wife Emma Berryhill, have hereunto set our hands and seals this the 21st day of August, 1907.

COLUMBUS BERRYHILL. [SEAL.]
EMMA BERRYHILL. [SEAL.]

UNITED STATES OF AMERICA,
Western District, Indian Territory:

On this 21st day of August, 1907, before me, E. E. Riley, a Notary Public, within and for the Western District of the Indian Territory, appeared in person Columbus Berryhill, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me Emma Berryhill, wife of the said Columbus Berryhill,

to me well known to be the person whose name appears upon the within and foregoing deed, and in the absence of her said husband, declared that she had of her own free will, signed the relinquishment of dower therein expressed, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public at Stone Bluff, in said District and Territory, on the 21st day of August, 1907.

[SEAL.] E. E. RILEY,
Notary Public.

My commission expires June 18, 1908.

55 EXHIBIT "F."

Know all men by these Presents:

That I, Theodore Berryhill, of Sapulpa, Western District Indian Territory, for and in consideration of the sum of One Hundred ($100.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained, and sold and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all my right, title, claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, Township 17 North, Range 12 East, and the Southwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the Northwest Quarter of the Northeast Quarter, and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section 13, Township 17, North, Range 12, East, being part of the allotment of Andrew J. Berryhill, deceased.

With all the improvements, privileges and appurtenances thereunto belonging or any wise appertaining.

To have and to hold the aforegranted premises to said D. A. McDougal, his heirs and assigns, forever. And I covenant with the said D. A. McDougal that I will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by me, but no further or otherwise.

And, for the consideration aforesaid and for divers other good and valuable considerations, I Rilla Belle Berryhill, wife of the said Theodore Berryhill, do hereby release and quit claim to the said D. A. McDougal, his heirs and assigns, all my rights, claim or possibility of dower in or to the aforegranted premises.

56 In witness whereof, we the said Theodore Berryhill, and wife, Rilla Belle Berryhill, have hereunto set our hands and seals the 16th day of August, 1907.

THEODORE BERRYHILL. [SEAL.]
RILLA BELLE BERRYHILL. [SEAL.]

UNITED STATES OF AMERICA,
Western District, Indian Territory:

On this 16th day of August, 1907, before me, R. C. Kinnaird a Notary Public, within and for the Western District of the Indian Territory, appeared in person Theodore Berryhill, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that of this day voluntarily appeared before me, Rilla Belle Berryhill, wife of the said Theodore Berryhill, to me well known to be the person whose name appears upon the within and foregoing deed, and, in the absence of her husband, declared that she had of her own free will assigned the relinquishment of dower therein expressed, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public in Sapulpa in said District and Territory on the 16th day of August, 1907.

[SEAL.] R. C. KINNAIRD,
Notary Public.

My Commission expires June 22, 1909.

57 EXHIBIT "G."

Know all men by these Presents:

That I, William Berryhill, of Sapulpa, Western District, Indian Territory, for and in consideration of the sum of One Hundred ($100.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all my right, title, Claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, township 17 North, Range 12 East, and the Southwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the Northwest Quarter of the Northeast Quarter, and the Southwest Quarter of the Northwest quarter of the Northeast quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased, with all the improvements, privileges and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the aforegranted premises to the said D. A. McDougal, his heirs and assigns, forever. And I covenant with the said D. A. McDougal that I will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by me, but no further or otherwise.

And for the consideration aforesaid, and for divers other good

and valuable considerations, I, Alice Berryhill, wife of the said William Berryhill, do hereby release and quit claim to the said D. A. McDougal, his heirs and assigns, all my right, claim or possibility of dower in or to the aforegranted premises.

58 In witness whereof, we the said William Berryhill and wife, Alice Berryhill, have hereunto set our hands and seal this the 16th day of August, 1907.

his
[SEAL.] WILLIAM x BERRYHILL.
mark.
[SEAL.] ALICE BERRYHILL.

Witness:
R. C. KINNAIRD.
JOE SELF.

UNITED STATES OF AMERICA,
Western District, Indian Territory:

On this 16th day of August, 1907, before me R. C. Kinnaird a Notary Public, within and for the Western District of the Indian Territory, appeared in person William Berryhill, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me, Alice Berryhill, wife of the said William Berryhill, to me well known to be the person whose name appears upon the within and foregoing deed, and in the absence of her said husband, declared that she had of her own free will signed the relinquishment of dower therein expressed, for the purposes therein contained and set forth without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public at Sapulpa, I. T., in said District and Territory on the 16th day of August, 1907.

[SEAL.] R. C. KINNAIRD,
Notary Public.

My Commission expires June 22, 1909.

59 EXHIBIT "H."

Know all men by these Presents:

That we, Mary Kiefer, and Charlie Kiefer, her husband of Sapulpa, Western District of the Indian Territory, for and in consideration of the sum of One Hundred Dollars ($100.00) *Dollars*, cash in hand paid, the receipt of which is hereby acknowledged, have t*jos* day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all our right, title, claim and interest in and to the following described

real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, Township 17 North, Range 12 East, and the Southwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the Northwest Quarter of the Northeast Quarter, and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased.

with all the improvements, privileges and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the aforegranted premises to the said D. A. McDougal, his heirs and assigns forever. And we covenant with the said D. A. McDougal that we will warrant and forever defend the Title to the aforegranted premises against the lawful claims of all persons claiming under, through or by us, but no further or otherwise.

In witness whereof, we the said Mary Kiefer and husband Charlie Kiefer, have hereunto set our hands and seals this the 16th day of August, 1907.

[SEAL.] MARY KIEFER.

his

[SEAL.] CHARLIE x KIEFER.

mark

Witness:
R. C. KINNAIRD.
MARY KIEFER.

60 UNITED STATES OF AMERICA,
Western District, Indian Territory:

On this 16th day of August, 1907, before —— —— a Notary Public within and for the Western District of the Indian Territory, appeared in person Charlie Kiefer, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same, for the consideration and purposes mentioned therein, and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me Mary Kiefer, wife to the said Charlie Kiefer, to me well known to be the person whose name appears upon the within and foregoing deed, and in the absence of her said husband declared that she had of her own free will executed the same, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public, at Sapulpa, I. T., in said District and Territory on the 16th day of August, 1907.

[SEAL.] R. C. KINNAIRD,
Notary Public.

My commission expires June 22, 1909.

61 EXHIBIT "1."

Know All Men by These Presents:

That we, Mrs. Josie Morton and Thomas Morton, her husband of Bald Hill, Western District, Indian Territory, for and in consideration of the sum of One Hundred Dollars ($100.00) *Dollars* cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal and to his heirs and assigns forever all our right, title and claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, Township 17 North, Range 12 East, and the Southwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the Northwest Quarter of the Northeast Quarter, and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased, with all the improvements, privileges and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the aforegranted premises to the said D. A. McDougal, his heirs and assigns forever. And we covenant with the said D. A. McDougal that we will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by us, but no further or otherwise.

In witness whereof, we, the said Josie Morton and husband Thomas Morton, have hereunto set our hands and seals this the 20th day of August, 1907.

JOSIE MORTON. [SEAL.]
his
THOMAS x MORTON.
mark.

Witness- to mark:
E. E. RILEY.
W. S. McCRAY.

62 UNITED STATES OF AMERICA,
Western District, Indian Territory:

On this 20th day of August, 1907, before me, E. E. Riley a Notary Public within and for the Western District of the Indian Territory, appeared in person Thomas Morton, to me personally well known as the person whose name appears on the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me, Josie Morton, wife to the said Thomas Morton, to me well known to be the person whose name appears upon the within and

foregoing deed, and, in the absence of her said husband, declared that she had of her own free will executed the same, for the purposes therein contained, and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public, at Morris, in said District and Territory, on the 20th day of August, 1907.

[SEAL.]

E. E. RILEY,
Notary Public.

My Commission expires June 18, 1907.

63 Said petition of the plaintiff is endorsed on the back as follows: D. A. McDougal vs. A. W. Shulthis, et al. Petition. District Court, State of Oklahoma, County of Tulsa. Filed April 5, 1913. W. W. Stuckey, Clerk.

64 And the same day, towit, the 5th day of April, 1913, the plaintiff filed the following præcipes for summonses in this cause:

65 In the District Copurt of Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
A. W. SHULTHIS et al., Defendants.

To the Clerk of Said Court:

Issue summons in the above entitled cause, and direct the same to the Sheriff of Muskogee County, State of Oklahoma, for the defendant Edmond McKay.

Action brought for quieting title, the appointment of a receiver and for an accounting.

Defendants required to answer on or before the 5 day of May, 1913.

Make summons returnable 15th day of April, A. D. 1913.

Dated this 5 day of April, A. D. 1913.

P. C. WEST,
Attorney for Plaintiff.

Endorsements: No. 3528. District Court, Tulsa County, Okla. Præcipe for summons. D. A. McDougal vs. A. W. Shulthis et al. P. C. West, Attorney. District Court, State of Oklahoma, County of Tulsa. Filed Apr. 5 1913. W. W. Stuckey, Clerk.

66 In the District Court of Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDOUGAL
vs.
A. W. SHULTHIS et al.

Præcipe for Summons.

To Clerk of Said Court:

Issue summons in the above entitled cause, and direc- the same to the Sheriff of Tulsa County, State of Oklahoma, for the defendant Perry McKay.

Action brought for quieting title, and appointment of a receiver and for an accounting.

Defendants required to answer on or before the 5 day of May, 1913.

Make summons returnable 15 day of April, A. D. 1913.

Dated this 5 day of April, A. D. 1913.

P. C. WEST,
Attorney for Plaintiff.

Endorsements: No. 3528. District Court, Tulsa County, Okla. Præcipe for summons. D. A. McDougal vs. A. W. Shulthis, et al. P. C. West, Attorney. District Court, State of Oklahoma, County of Tulsa. Filed Apr. 5 1913. W. W. Stuckey, Clerk.

67 In the District Court of Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDOUGAL
vs.
A. E. SHULTHIS et al.

Præcipe for Summons.

To the Clerk of Said Court:

Issue summons in the above entitled cause, and direct the same to the Sheriff of Knox County, State of Missouri, for the defendant, John V. McKay.

Action brought for quieting title, the appointment of a receiver and for an accounting.

Defendants required to answer on or before the 15th day of June, 1913.

Make summons returnable 15th day of April, A. D. 1913.

Dated this 5 day of April, A. D. 1913.

P. C. WEST,
Attorney for Plaintiff.

Endorsements: No. 3528. District Court, Tulsa County, Okla. Præcipe for summons. D. A. McDougal vs. A. W. Shulthis. P. C. West, Attorney. District Court, State of Oklahoma, County of Tulsa. Filed Apr. 5 1913. W. W. Stuckey, Clerk.

68 In the District Court of Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDOUGAL
vs.
A. W. SHULTHIS et al.

Præcipe for Summons.

To the Clerk of Said Court:

Issue Summons in the above entitled cause, and direct the same to the Sheriff of Montgomery County, State of Kansas, for the defendant Albert W. Shulthis.

Action brought for quieting title, the appointment of a receiver and an accounting.

Defendants required to answer on or before the 15 day of June, 1913.

Make summons returnable 15 day of April A. D. 1913.

Dated this 5 day of April, A. D. 1913.

P. C. WEST,
Attorney for Plaintiff.

Endorsements: No. 3528. District Court, Tulsa County, Okla. Præcipe for summons. D. A. McDougal vs. A. W. Shulthis et al. P. C. West, Attorney. District Court, State of Oklahoma, County of Tulsa. Filed Apr. 5, 1913. W. W. Stuckey, Clerk.

69 Upon the 5th day of April, 1913, summons was issued out of the said court in said cause to the Sheriff of Montgomery County, Kansas, for the defendant Albert W. Shulthis, which summons was returned and filed on the 12th day of April, 1913, and is in the words and figures following, towit:

70 STATE OF OKLAHOMA,
Tulsa County, ss:

In the District Court.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
A. W. SHULTHIS et al., Defendant-.

Summons.

The State of *Kansas* to the Sheriff of Montgomery County, Greetings:

You are hereby commanded to notify Albert W. Shulthis that he has been sued by D. A. McDougal in the District Court of Tulsa County, Oklahoma, and that he must answer the petition of said D. A. McDougal filed against him in said Court, in the City of Tulsa, in said County, on or before 60 days after the date of service, or said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 15th day of April, A. D. 1913.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court of Tulsa in said county this 5th day of April A. D. 1913.

W. W. STUCKEY, *Clerk,*
[SEAL.] By BERTHA M. BLACK, *Deputy.*

Suit brought for quieting title, the appointment of a Receiver and an accounting.

If the defendant fail to answer, plaintiff will take judgement for the sum of $— with interest thereon at the rate of — per cent. per annum from the — day of —— 191–, and cost of suit.

W. W. STUCKEY,
District Clerk,
By BERTHA M. BLACK, *Deputy.*

71 *Sheriff's Return.*

STATE OF OKLAHOMA,
—— *County, ss:*

Received this *24*it April 7th, 1913, at 9:30 o'clock A. M., and served the same upon the following persons, defendants, within named, at the time following, to wit: Albert W. Shulthis April 7, 1913 by delivering to *each and* said defendant, personally, in said County, a true and certified copy of the within summons, with all the endorsements thereon.

R. W. LEWIS, *Sheriff.*

Sheriff's Fees:
Service and return, first person.. $.50.

Endorsements: No. 3528. In District Court. Summons. D. A. McDougal vs. A. W. Shulthis, et al. District Court, State of Oklahoma, County of Tulsa. Apr. 9, 1913. W. W. Stuckey, Clerk.

72 On April 5, 1913, there was issued out of said Court a summons in said cause to the defendant Perry McKay, which said summons was returned and filed on the 12th day of April, 1913, and is in the words and figures following, towit:

73 STATE OF OKLAHOMA,
Tulsa County, ss:

In the District Court.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
A. W. SHULTHIS et al., Defendants.

Summons.

The State of Oklahoma to the Sheriff of Tulsa County, Greeting:

You are hereby commanded to notify Perry McKay that he has been sued by D. A. McDougal in the District Court of Tulsa County, Oklahoma, and that he must answer the petition of said D. A. McDougal filed against him in said Court, in the City of Tulsa, in said County, on or before the 5th day of May, 1913, or said petition will be taken as true and judgement rendered accordingly.

You will make due return of this summons on the 15th day of April, A. D. 1913.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Tulsa, in said County, this 5th day of April, A. D. 1913.

[SEAL.] W. W. STUCKEY, *Clerk*,
By BERTHA M. BLACK, *Deputy*.

Suit brought for Quieting title, the appointment of a receiver, and for an accounting.

If the defendant fail to answer, plaintiff will take judgement for the sum of $— with interest thereon at the rate of — per cent. per annum from the — day of —— 191– and cost of suit.

[SEAL.] W. W. STUCKEY. *Clerk*,
By BERTHA BLACK, *Deputy*.

74 *Sheriff's Return.*

STATE OF OKLAHOMA,
Tulsa County, ss:

Received this writ April 5, 1913, at — o'clock — M., and served the same upon the following persons, defendants, within named, at

the times following, towit: Perry McKay, April 12th, 1913 by leaving for said defendant at his usual place of residence in said county, with a member of his family over fifteen years of age, towit, Mrs. Perry McKay, wife of said defendant, a true and certified copy of the within summons, with all the endorsements thereon.

W. W. McCULLOUGH, *Sheriff*,
By T. S. HIGGINS, *Deputy*.

Sheriff's Fees:

Service and return, first person...	$.50
1 copy summons.....	.25
Mileage 48 miles.....	4.80
Total	$5.55

Endorsements: No. 3528. In District Court. Summons. D. A. McDougal vs. A. W. Shulthis, et al. District Court, State of Oklahoma, County of Tulsa. Filed Apr. 12, 1913. W. W. Stuckey, Clerk.

75 Upon the 5th day of April 1913, there was issued out of said court a summons to the defendant John V. McKay, which summons was returned and filed on the 14th day of April, 1914, and is in the words and figures following, towit:

76 STATE OF OKLAHOMA,
Tulsa County, ss:

In the District Court.

No. 3528.

D. A. McDOUGAL, Plaintiff,

—

A. W. SHULTHIS et al., Defendants.

Summons.

The State of Missouri to the Sheriff of Knox County, Greeting:

You are hereby commanded to notify John V. McKay that he has been sued by D. A. McDougal in the District Court of Tulsa County, Oklahoma and that he must answer the petition of said D. A. McDougal filed against him in said Court, in the City of Tulsa, in said County, on or before 60 days after date of service, or said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 15th day of April, A. D. 1913.

In witness whereof, I have hereunto set my hand and affixed the

seal of said Court at Tulsa in said County this 5th day of April, A. D. 1913.

[SEAL.] W. W. STUCKEY, *Clerk*,
By BERTHA M. BLACK, *Deputy*.

Suit brought for quieting title, the appointment of a receiver, and for an accounting.

If the defendant fail to answer, plaintiff will take judgment for the sum of $—, with interest thereon at *the* — per cent. per annum from the — day of ——, 191–, and cost of suit.

W. W. STUCKEY, *Clerk*,
By BERTHA M. BLACK, *Deputy*.

77 *Sheriff's Return.*

STATE OF MISSOURI,
Knox County, ss:

Received this writ April 7th, 1913, at — o'clock — M., and served the same upon the following persons, defendants, within named, at the times following, to-wit: John V. McKay, April 11th, 1913, by delivering to *each and* said defendant, personally in said County a true copy of the within summons, with all the endorsements thereon.

CHARLES ALLEN, *Sheriff*.

Sheriff's Fees:

Service and return, first person....$2.75, paid by pl'ff.

Endorsements: No. 3528. In District Court. Summons. D. A. McDougal vs. A. W. Shulthis et al. District Court, State of Oklahoma County of Tulsa. Filed Apr. 14, 1913. W. W. Stuckey, Clerk. P. C. West, Attorney for Plaintiff.

78 And upon the 5th day of April, 1913, there was issued out of said Court a summons to the defendant Edmond McKay, which summons was served, returned and filed on the 17th day of April, 1913, and is in the words and figures following to wit:

79 STATE OF OKLAHOMA,
Tulsa County, ss:

In the District Court.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
A. W. SHULTHIS et al., Defendants.

Summons.

The State of Oklahoma to the Sheriff of Muskogee County, Greetings:

You are hereby commanded to notify Edmond McKay that he has been sued by D. A. McDougal in the District Court of Tulsa County, Oklahoma, and that he must answer the petition of said D. A. McDougal filed against him in said Court, in the City of Tulsa, in said County on or before the 5th day of May, 1913, or said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 15th day of April, A. D. 1913.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Tulsa in said County, this 5th day of April, A. D. 1913.

[SEAL.]

W. W. STUCKEY, *Clerk,*
By BERTHA M. BLACK, *Deputy.*

Suit brought for quieting title, the appointment of a receiver and for an accounting.

If the defendant fail to answer, plaintiff will take judgment for the sum of $—, with interest thereon at the rate of — per cent per annum from the — day of ——, 191– and cost of suit.

W. W. STUCKEY, *District Clerk,*
By BERTHA M. BLACK, *Deputy.*

80 *Sheriff's Return.*

STATE OF OKLAHOMA,
—— *County, ss:*

Received this writ 12 April, 1913, at 2 o'clock P. M., and served the same upon the following persons, defendants, within named, at the times following, to-wit: Edmond McKay 12 April, 1913, by delivering to *each and* said defendant, personally, in said County a true and certified copy of the within summons, with all the endorsements thereon.

J. F. LEDBETTER, *Sheriff.*
R. E. PRITCHARD, *Deputy.*

Sheriff's Fees:

Service and return, first person	$.50
Copy 1 summons	.25
Mileage 10 miles	1.00
Total	1.75

Endorsements: No. 3528. In District Court. Summons. D. A. McDougal vs. A. W. Shulthis, et al. P. C. West, Attorney for Plaintiff. District Court, State of Oklahoma, County of Tulsa. Filed Apr. 17, 1913. W. W. Stuckey, Clerk.

81 And thereafter, towit, on the 9th day of March, 1914, there was filed the answer of the defendants Edmond McKay, Perry McKay and Albert W. Shulthis, which said answer is in the words and figures following, to-wit:

82 In the District Court in and for Tulsa County, Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY, PERRY McKAY, JOHN V. McKAY, and ALBERT W. SHULTHIS, Defendants.

Answer.

Come now the defendants Edmond McKay, Perry McKay, and Albert W. Shulthis by their attorneys, Ramsey & Thomas, and leave of Court being first had and obtained, file this their answer to the petition of the plaintiff herein, and allege and state:

1. That they admit the allegations of paragraph numbered one of said petition.

2. Further answering said petition, and particularly paragraph numbered two thereof, defendants deny that the plaintiff is the owner of the fee to the real estate in said paragraph two described and allege and state that the plaintiff has no right, title, interest or estate in or to the same, or any part thereof, and deny that defendants Edmond McKay, Perry McKay and John V. McKay, are the owners only of a life estate in said lands as in said petition set out.

3. Further answering said petition, and particularly paragraph three thereof, defendants admit the allegations contained in said paragraph three.

4. Further answering said petition, and particularly paragraph four thereof, defendants admit the allegations contained in said paragraph four.

83 5. Further answering said petition, and particularly paragraph five thereof, defendants allege and state that they ad-

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mit that on June 5th 1906 George Franklin Berryhill and Clementine Berryhill, mentioned in said petition as father and mother of Andrew J. Berryhill deceased, executed and delivered to the defendants, Edmond McKay and Perry McKay, their warranty deed, whereby they did grant, bargain, sell and convey unto the said Edmond McKay and Perry McKay all their right, title and interest in and to the lands in the petition described, and admit the recording of said deed as in said petition set forth, but defendants deny that by said deed there was conveyed to the said Edmond McKay and Perry McKay a life estate only in and to the lands and premises in the petition described.

And defendants admit that on or about the 9th day of August, 1910, the said Edmond McKay and Perry McKay, joining with them their wives, Florence McKay and Gusta McKay, executed and delivered to John V. McKay a deed of conveyance of an undivided one-third interest in and to said land, but defendants deny that by the execution and delivery of said deed the said John V. McKay became the owner only of an undivided one-third interest in and to a life estate during the life of the said George Franklin Berryhill, and defendants allege and state that under and by virtue of said conveyance the said defendant John V. McKay, became the owner in fee of an undivided one-third interest in and to said lands.

Defendants admit that the said Andrew J. Berryhill, deceased, left surviving him the following Uncles and Aunts:

Martha Lee Keifer, Sanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Keifer, and Josie Morton.

84 But defendants deny that said Uncles and Aunts inherited the fee in said land subject only to a life estate in the father, George Franklin Berryhill. And defendants deny that the said Uncles and Aunts inherited any interest whatsoever in and to the said lands or any part thereof, and allege and state that the said Uncles and Aunts never at any time owned any right, title or interest by inheritance, or otherwise, in and to said lands, or any part thereof.

Defendants admit the execution and delivery of the deeds as set forth in said petition executed to the plaintiff by the above named Uncles and Aunts of the said Andrew J. Berryhill, and admit the recording of said deeds as set forth in the petition, and admit that exhibits C, D, E, F, G, H, & I, are correct copies of said deeds, but defendants deny that the plaintiff acquired any interest whatsoever in or to said lands under *any* by virtue of the execution and delivery of said deeds, and deny that under and by virtue of said deeds or conveyances the plaintiff, D. A. McDougal, became vested with, and now is the owner of, any interest whatsoever in and to said lands, or any part thereof.

Defendants admit that in the month of May, 1901, there was born to George Franklin Berryhill and Clementine Berryhill, husband and wife, a son, the said Andrew J. Berryhill, and admit that the said George Franklin Berryhill is, and at all times mentioned in the petition was, a Creek Indian and a Citizen of the Creek Nation duly

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enrolled as such by the Commission to the Five Civilized Tribes as a citizen by blood, and admit that his name appears upon the Rolls of said Commission as a mixed blood Indian, and not as a full blood, and defendants admit that the said Clementine Berryhill,
85 wife and mother, at no time was a citizen of the Creek Nation, and admit that the said Andrew J. Berryhill died in the month of November, 1901, intestate and unmarried, leaving no brother or sister surviving him. Defendants admit that on or about October 8th, 1902, tha name of the said Andrew J. Berryhill was duly placed upon the tribal rolls of the Creek Nation as a citizen thereof by the Commission to the Five Civilized Tribes, and his enrollment as such citizen was approved by the Secretary of the Interior on November 14th, 1902, and admit that in the year 1904 the said Commission set apart and allotted to the said Andrew J. Berryhill, deceased, the lands in the petition described, together with other lands. And admit that on or about October 10th, 1905 the United States of America, together with the Creek Nation, through the Principal Chief of the Creek Nation, and on behalf of the Creek Nation, did execute a deed or patent covering and describing said lands, which said patent was subsequently approved by the Secretary of the Interior, and defendants admit that by the execution of said patent the title in and to said land was conveyed and confirmed to the heirs of the said Andrew J. Berryhill, deceased, and defendants allege and state that under and by virtue of the execution and delivery of said patent there was conveyed, and became vested in the said George Franklin Berryhill, the father of said Andrew J. Berryhill, title in fee simple absolute in and to the lands in the petition of the plaintiff described.

And defendants allege and state that under and by virtue of said deed, executed as aforesaid on June 5th, 1906, and under and by virtue of the said deed executed as aforesaid on August 9th, 1910 by Edmond McKay and Perry McKay, and their wives, to John
86 V. McKay, the said Edmond McKay, Perry McKay and John V. McKay now own and hold the fee simple title to the above described lands.

Defendants deny that the oil and gas in and under said land is owned by, and is the property of, the plaintiff, and deny that the plaintiff has any right, title or interest in or to the said oil or gas, or any part thereof.

6. Further answering plaintiff's petition, and particularly paragraph six thereof, defendants deny that the plaintiff is the owner of all of the oil and gas in and under the lands in the petition described and deny that he has any right, title or interest in or to the same, or any part thereof, and defendants deny that the prospecting and drilling for oil and gas upon said lands has been done without authority, and deny that the same is in violation of any rights of the plaintiff in said premises, and deny that said prospecting and drilling constitutes a continuing trespass upon said land and denies that the same constitutes any waste or diminution of any estate of the plaintiff in or to said land, and denies that said operations wioll in any wise work plaintiff any injury whatsoever.

7. Further answering said petition, and particularly paragraph seven thereof, defendants admit that prior to the commencement of this suit the defendant, Albert W. Shulthis, had entered upon said lands, and had drilled oil and gas wells thereon and was producing oil and gas from said land, and admit that the said defendant, Albert W. Shulthis, is in possession of the said lands operating the same for oil and gas, but defendants deny that the said Albert W. Shulthis, or *and* of said defendants, are producing or selling oil or gas from said lands without right, and without any title thereto, and deny that the plaintiff, D. A. McDougal, is the sole and exclusive
87 owner of all the oil produced from said lands, or that may be produced from said lands, and deny that the plaintiff has any interest whatsoever therein. Defendants admit that the said defendant, Albert W. Shulthis, has entered upon said premises, and is mining the same for oil and gas, and is producing oil and gas therefrom under and by virtue of a lease contract with the co-defendants herein, Edmond McKay, Perry McKay and John V. McKay, and defendants allege and state that said contract is a written contract, by the terms of which the said defendant Albert W. Shulthis, has the sole and exclusive right to enter upon said premises and operate the same for oil and gas, and produce oil and gas therefrom; that by the terms of said contract the said Albert W. Shulthis binds himself to pay to the said lessors, as a royalty one-eighth of all the oil produced and saved from said leased premises; that said lease contract was, prior to the commencement of this suit, duly filed for record and recorded in the office of the Register of Deeds in and for Tulsa County, State of Oklahoma.

Further answering said petition and particularly paragraph eight thereof, defendants admit that the said Albert W. Shulthis has entered upon said lands, and is *poerating* the same for oil and gas under the claim that the father of Andrew J. Berryhill, deceased, George Franklin Berryhill, was the sole heir of the said Andrew J. Berryhill, deceased, but deny that the defendants herein assert their title by inheritance, but allege and state that under *any* by virtue of the patents executed and delivered as aforesaid by the United States of America and the Creek Nation, there was granted and conveyed to the said George Franklin Berryhill title in fee to the lands in the petition described, and defendants admit that by virtue of the conveyance from George Franklin Berryhill to Edmond Mc-
88 Kay and Perry McKay, and the subsequent conveyance by Edmond McKay and Perry McKay to John V. McKay, the said defendants, Edmond McKay, Perry McKay and John V. McKay, became vested with the title to said land and premises in fee simple, and are vested with title to the oil and gas in and under said land, and have a right to make and execute a valid lease for oil and gas mining purposes upon said land, and that the defendant, Albert W. Shulthis, under a lease contract with said Edmond McKay, Perry McKay, and John V. McKay, has the right to enter upon said lands and prospect the same for oil and gas, and to drill wells thereon, and produce oil and gas therefrom, and to sell and dispose

of the same. Defendants deny that the plaintiff, D. A. McDougal is entitled to said oil and gas, and to the proceeds arising and accruing from the sale and disposition thereof.

9. Further answering plaintiff's petition, and particularly paragraph nine thereof, defendants deny that they claim title to said land by descent but allege and state, as hereinbefore set forth, that they claim to be the owners in fee simple of said land under and by virtue of the execution and delivery of said patents by the United States of America and the Creek Nation to the heirs of the said Andrew J. Berryhill, deceased, and by the subsequent conveyance by George Franklin Berryhill to these defendants.

Defendants deny each and every other allegation in said paragraph nine not herein admitted or denied.

Wherefore, Defendants pray that the plaintiff take nothing by his petition herein, that the same be dismissed with prejudice, and that these defendants have their costs herein incurred.

RAMSEY & THOMAS,
Attorneys for Defendants.

89 We concent that this answer may be filed out of time.

ROSSER & COCHRAN,
Att'ys for Plaintiff.

Endorsements: No. 3528. D. A. McDougal, Plaintiff, vs. Edmond McKay, et al., Defendants. Answer. District Court, State of Oklahoma, County of Tulsa. Filed Mar. 9, 1914. W. W. Stuckey, Clerk. Ramsey & Thomas, Muskogee, Okla., Attorneys for Defendants.

90 And thereupon, on the same day, to wit, the 9th day of March, 1914, there was filed the Separate answer of the Defendant John V. McKay, which separate answer is in the words and figures following, to wit:

91 In the District Court in and for Tulsa County, Oklahoma.

No. 3528.

D. A. McDougal, Plaintiff,
vs.
Edmond McKay, Perry McKay, John V. McKay, and Albert W. Shulthis, Defendants.

Separate Answer of John V. McKay.

Comes now the defendant, John V. McKay, by his attorneys Ramsey & Thomas, and leave of Court being first had and obtained files this his answer to the petition of the plaintiff herein, and alleges and states;

That he hereby adopts and makes as his answer herein, the answer

filed herein by Edmond McKay, Perry McKay and Albert W. Shulthis.

And for further answer and defense to the petition of the plaintiff herein, this defendant alleges that on or about the 11th day of September. 1912. he as sole complainant. commenced a suit in the United States District — for the Eastern District of Oklahoma against the plaintiff herein, D. A. McDougal. as sole defendant; that said action is still pending in said Court and undetermined; that said suit is for the same identical cause of action mentioned in the petition of the plaintiff herein, and in said suit this defendant claims title in fee to an undivided one-third interest in and to the lands in controversy herein, and alleges that he is in possession of said land, and that he derives his title to said land under and by virtue of the conveyances mentioned and described in the petition of the
92 plaintiff herein; and this defendant further alleges in his said Bill of Complaint *is* said Court that the plaintiff herein asserts some title and interest in and to said lands adverse to the plaintiff under and by virtue of the deeds to the plaintiff herein, all as set forth in his petition herein. And in said pending suit this defendant as complainant, prays that he be adjudged to be the owner in fee of an undivided one-third interest in and to said lands, and that the plaintiff herein be declared to have no right, valid claim or title, or any interest whatsoever in said land, and that the deeds under which the plaintiff herein claims, and which are described i the petition herein, be delivered up to be canceled as clouds upon the title of this defendant to said lands.

Wherefore, This defendant prays that the petition of the plaintiff herein be dismissed as to him, and that he have his costs herein incurred.

RAMSEY & THOMAS,
Attorneys for Defendant John V. McKay.

We consent to the filing of the foregoing answer out of time.
ROSSER & COCHRAN,
Attorneys for Plaintiff.

Endorsements: No. 3528. D. A. McDougal, Plaintiff, vs. Edmond McKay, et al. Defendants. Answer of John V. McKay. District Court, State of Oklahoma, County of Tulsa. Filed Mar. 9 1914. W. W. Stuckey, Clerk. Ramsey & Thomas, Muskogee, Okla., Attorneys for Defendant.

93 In the District Court in and for Pawnee County, State of Oklahoma.

No. 3528.

D. A. McDougal, Plaintiff,
vs.
Edmond McKay et al., Defendants.

Transcript of the Evidence.

Be it remembered, That heretofore, to wit, on the 10th day of March, 1914, the same being one of the regular days of the March 1914 term of said Court, the above entitled cause came on for hearing before his Honor, L. M. Poe, Judge of said Court, both parties being present by counsel and having announced ready for trial.

Present:

Rosser & Cochran, by Judge M. E. Rosser, and L. O. Lytle, Esq., Appearing for the plaintiff.
Ramsey & Thomas, by C. L. Thomas, Esq., Appearing for the Defendants.

And thereupon the following proceedings were had, to wit:
94 Judge Rosser: We offer in evidence first the deposition of N. A. Gibson, taken on the 5th of March.
Mr. Thomas: We object to the offer of the deposition of N. A. Gibson for the reason same is incompetent, irrelevant and immaterial.
The Court: The objection to the offer will be sustained.
Judge Rosser: We except.
(Which deposition is attached hereto and appears at page 97.)
Judge Rosser: We offer the deposition of Mr. J. C. Stone.
Mr. Thomas: To which offer defendants object for the reason that the same is incompetent, irrelevant and immaterial.
The Court: Sustained.
Judge Rosser: We except.
(Which deposition is attached hereto and appears on page 103.
Judge Rosser: We offer the deposition of Mr. Guy L. Andrews of McAlester.
Mr. Thomas: To which offer defendants object for the reason that same is incompetent, irrelevant and immaterial.
The Court: Sustained.
Judge Rosser: We except.
(Which deposition is attached hereto and appears at page 128.)
Judge Rosser: We offer the deposition of Mr. Jean P. Day of McAlester.
Mr. Thomas: To which offer defendants object for the reason that same is incompetent, irrelevant and immaterial.
95 The Court: Sustained.
Judge Rosser: Exception.

(Which deposition is attached hereto and appears at page 132.)

Judge ROSSER: Now we offer to prove by Mr. Gray Carroll, of this city that he is a member of the bar and has been engaged in the practice here for the past eight years; that he is familiar with land titles and with Indian land questions; that he is familiar with the case of Shulthis vs. McDougal decided and reported in 170 Fed. 529; that prior to the time that decision was rendered that it was the opinion of a great majority of the bar of this part of the state—of the old Indian Territory—that the allotted lands to members of the Five Civilized Tribes were new acquisitions and not ancestral estates and that the inherited land that was bought prior to that decision was practically all bought on that theory and with the idea that the parent only had a life estate and that the collateral kindred owned the fee. And we offer to prove by him also that since that decision that it has not been acquiesced in by the bar; that members of the bar have continued to advise their clients that it is not safe to rely upon that opinion and that the only safe way that they could proceed in order to get a title that was beyond question was to buy both from the parents and from the collateral kindred and that the bar have never acquiesced in that opinion as being sound law; that they have never believed that it was good law.

We expect to prove practically the same facts by Mr. A. J.
96 Biddison.

We expect to prove by Mr. C. S. Walker and we offer him as a witness to prove that prior to the decision in the case of Shulthis vs. McDougal reported in 170 Fed. 529 that allotted lands were considered new acquisitions and not ancestral estates and that that was the general opinion of the bar of the Indian Territory and that all or practically all of the inherited lands that were sold prior to that decision were sold by the heirs and bought by the purchaser on the theory that the parent only owned a life estate, and that the parent only received a consideration based upon the theory that he or she or both were the owners of the life estate and that the collateral heirs owned the fee and that the collateral heirs were paid upon the theory that they were the owners of the fee.

We offer to make that proof.

Mr. THOMAS: To all of which offer defendants object for the reason that the evidence offered is incompetent, irrelevant and immaterial in that it does not go to prove or disprove any issues in this case.

The COURT: Sustained.

Judge ROSSER: Exception.

We offer to prove the same facts by Mr. D. B. Hughes who is a member of the bar of Sapulpa and who has practiced in this state fourteen years, that he knows the general opinion of the bar prior to the case of Shulthis vs. McDougal and that it was the general concensus of opinion of the bar that the allotted lands were
97 new acquisitions and not ancestral estates. We also offer to prove by him and expect to prove by him if permitted that since that decision that it has not been acquiesced in by the bar and that the members of the bar generally have *have* continued to advise

their clients in his part of the country that it was not safe to rely upon that opinion in purchasing inherited Indian lands, and that purchases of inherited lands have been made upon the theory that parents only owned the life estate and the collateral kindred owned the fee and the consideration has been paid on that theory and in that proportion and that practically all the land that was sold prior to that decision was bought and sold upon that theory and that a very great majority or a very much larger portion of the inherited lands of the Creek Nation that have been sold as inherited lands were sold prior to the rendition of that opinion and upon that theory that the land was new acquisitions.

We expect to prove the same facts by Mr. Harry Campbell of the Tulsa bar; we expect to prove the same facts by Frank P. Smith of the Sapulpa bar, and by Mr. J. F. Lawrence of Sapulpa and Mr. L. O. Lytle of Sapulpa.

We offer all these witnesses to make this proof.

Mr. THOMAS: To all of which offer defendants object for the reason that the same is incompetent, irrelevant and immaterial and that the evidence offered does not tend to prove or disprove any material issues in this case.

98 Judge ROSSER: We except.

We offer also the exhibits to the deposition of Mr. N. A. Gibson consisting of certain chapters of Mr. S. T. Bledsoe's work entitled "Indian Land Laws," both the first and the second editions, and also an article which I read before the Bar Association, and which are made exhibits to Mr. Gibson's deposition, for the purpose of showing that this decision was never acquiesced in by the bar of the state and has not been up to this time.

Mr. THOMAS: To which offer of evidence defendants object for the reason that the same is incompetent, irrelevant and immaterial.

The COURT: Sustained.

Judge ROSSER: Exception.

We offer to prove now by the witnesses that some of the District Judges refused to follow the decision and continued to decide cases upon the theory and to hold notwithstanding the opinion in the case of Shulthis vs. McDougal that allotted lands were new acquisitions, that the parents only received a life estate in cases of inherited lands, that the collateral heirs were thw owners of the fee.

We offer to prove this by several witnesses, and we also offer to prove by several witnesses that the county judges also refused to follow that decision and required it to be inserted in deeds where inherited lands were purchased that the parents were only selling a life estate.

Mr. THOMAS: Before making an objection to that offer, I
99 would like to—I don't believe, if the court please, that that is a proper offer unless he names his witnesses.

Judge ROSSER: All right I will name the witnesses and the judges.

Mr. THOMAS: All right.

Judge ROSSER: We offer to prove by Mr. L. O. Lytle and Mr. Frank P. Smith and Mr. D. B. Hughes that Judge W. L. Barnum, District Judge of the 22nd District refused to follow this decision

nand notwithstanding the decision continued to hold that the lands were new acquisitions, and that the parents only had a life estate. And I don't like to testify, but I believe in a case of this sort—would you consider it improper Mr. Thomas?

Mr. THOMAS: No, not at all.

Judge ROSSER: I will testify myself that while I was District Judge I refused to follow it in a number of cases and also have personal knowledge that Judge D. A. Richardson refused to follow it and can testify to that fact and offer to testify to that fact now.

Mr. THOMAS: To which offer defendants object for the reason that the evidence offered is incompetent, irrelevant and immaterial.

Judge ROSSER: And that Judge Josiah G. Davis, County Judge of Creek County refused to follow it.

Mr. THOMAS: To which offer defendants object for the reason that the same is incompetent, irrelevant and immaterial.

The COURT: Sustained.

100 Judge ROSSER: Save an exception. We except to the ruling of the court in excluding all of this evidence.

Mr. THOMAS: If the court please, one of these defendants, John V. McKay, has in a separate defense which I didn't mention in my opening statement, but there is another suit pending involving this same controversy and such was the fact prior to the institution of this suit. John V. McKay instituted—he is a resident of Missouri, by the way—he instituted a suit in the United States District court for the Eastern District of Oklahoma to quiet his title to this third interest against all claims of D. A. McDougal and that suit is still pending, and counsel for the plaintiff and ourselves have entered into an agreed statement of facts covering this one defense and I would like to file this agreed statement of facts.

The COURT: Let the agreed statement of facts be filed.

Which said agreed statement of facts is in the words and figures following, to-wit:

101 In the District Court in and for Tulsa County, Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Agreed Statement of Facts.

Come now the parties hereto, by their attorneys of record, and stipulate and agree that the following is a true and correct statement of certain of the facts pertaining to the issues in this cause, and that the matters of fact covered by this statement shall not be subject to contradiction by other testimony or evidence, and shall not in any wise impair the right of any of the parties hereto to make proof

of other material facts herein not covered by this agreed statement, and it is agreed that this statement shall be filed in the record as part of the record in this cause and submitted to the court accordingly. It is agreed that the following are the facts to-wit:

First. That on or about the 10th day of September, 1912, the defendant herein, John V. McKay, filed in the United States District Court for the Eastern District of Oklahoma, his bill of complaint against D. A. McDougal, the plaintiff herein, as defendant; that said suit was docketed as Number 1878; that said bill of complaint is shown by a copy thereof attached hereto, made a part of this agreed statement of facts, and marked "Exhibit B."

102 Second. That thereafter the plaintiff herein, D. A. McDougal, filed his answer in said cause in the United States District Court for the Eastern District of Oklahoma; that said answer is shown by a true and correct copy thereof attached hereto, made a part of this agreed statement of facts, and marked "Exhibit B."

Third. That said suit, wherein John V. McKay is plaintiff and D. A. McDougal is defendant, is now pending, and undisposed of, and was pending and undisposed of, at the time of the institution of this suit.

Fourth. It is further especially agreed that Exhibit A attached to the petition of the plaintiff herein is a true and correct copy of the deed executed June 5th, 1906, by George F. Berryhill and Clementine Berryhill, his wife, as grantors, to the defendants, Edmond McKay and Perry McKay, as Grantees, and that said deed shall be taken and considered as in evidence in this cause, and considered by the court without further proof of the execution or delivery of the same.

Dated this 9th day of March, 1914.

ROSSER & COCHRAN,
Attorneys for Plaintiff.
RAMSEY & THOMAS,
Attorneys for Defendants.

103 EXHIBIT A.

In the United States Court for the Eastern District of Oklahoma.

Number 1878.

JOHN V. MCKAY, Complainant,
VS.
D. A. MCDOUGAL, Defendant.

Bill in Equity.

To the Honorable Circuit Judges of the United States for the Eastern District of Oklahoma:

John V. McKay, a citizen of the State of Missouri, brings this his bill against the defendant above named, and thereupon your orator complains and says:

First.

That he is now and was at all times herein mentioned a citizen and resident of and within the State of Missouri. That at all times herein mentioned the said defendant, D. A. McDougal, was and is a citizen of that part of the state of Oklahoma now comprising the Eastern District of Oklahoma.

Second.

That in the month of May, A. D. 1901, there was born to one George Franklin Berryhill and one Clementine Berryhill, husband and wife, a son, who was named Andrew J. Berryhill. That said George Franklin Berryhill is and at all times herein mentioned was a Creek Indian and a citizen of the Creek Nation and his name appears on the approved roll of the Creek Nation as a mixed blood Indian citizen of said Nation.

104 That the said Clementine Berryhill is not and no time has been a citizen of the Creek Nation.

That the said Andrew J. Berryhill departed this life in the month of November, 1901 intestate and unmarried, that he left no issue nor brother nor sister surviving him.

That thereafter and on or about the 8th day of October, 1902, the name of the said Andrew J. Berryhill was duly placed on the approved Creek Indian Roll of the said Creek Nation, and that thereafter there was allotted by the Commission to the Five Civilized Tribes to the heirs of the said Andrew J. Berryhill, deceased, the following described land situated in the Creek Nation, and being in the Eastern District of Oklahoma, to-wit:

The East half of the Northwest Quarter of the Northeast Quarter and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section Thirteen (13) Township Seventeen (17) North Range Twelve (12) East, Tulsa County, Oklahoma,

together with other lands not herein involved.

That thereafter and on the 10th day of October, A. D. 1905, the United States of America together with the Creek Nation did execute a deed or patent to said land, whereby the United States of America and the Creek Nation did sell and convey unto the heirs of the said Andrew J. Berryhill, deceased, the above described lands.

That thereafter, and on October 31, 1905, said deed or patent was duly approved by the Secretary of the Interior of the United States, and is recorded in volume 2 at page 504 of the rec-

105 ords in the office of the Commissioners to the Five Civilized Tribes.

Third.

That at the death of the said Andrew J. Berryhill he left surviving him, as his only heir, his father, the said George Franklin Berryhill.

Fourth.

That on the 5th day of June, 1906, the said George Franklin Berryhill was the owner in fee of the above described lands, and on

the said 5th day of June, 1906, the said George Franklin Berryhill, joining with him his wife, the said Clementine Berryhill, did execute and deliver to Edmond McKay and Perry McKay, his certain warranty deed, wherein and whereby he did convey to the grantees named in said deed, in fee simple, the above described lands.

That said deed was thereafter and on June 5, 1906, duly filed for record, and is recorded in volume 9 at page 387 of the records in the office of the Register of Deeds at Sapulpa, Oklahoma.

Fifth.

That thereafter and on the 19th day of August, 1910, the said Edmond McKay and Perry McKay, joining with them their wives, Florence McKay and Gusta McKay, did execute and deliver to the complainant herein their certain deed whereby for a valuable consideration they did convey to the complainant herein an undivided one-third interest in and to the lands above described.

That said deed was duly filed for record on June 18, 1912, and is recorded in book 128 at page 342 of the records in the office of the Register of Deeds in and for Tulsa County, Oklahoma.

That under and by virtue of the said conveyance this complainant is the *w*oner in fee of an undivided one-third interest in
106 and to said above described lands.

Sixth.

That the complain-t is in possession of said books and that the matter in dispute herein exceeds exclusive of interest and costs the sum of Three Thousand Dollars ($3,000.00).

Seventh.

That on the 20th day of August, 1907, Martha E. Lee Keifer, joining with her husband, Smith Kiefer, did execute and deliver unto the defendant herein their certain deed wherein they did purport to transfer and convey unto the defendant all their right, title claim an interest in and to the above described lands and real estate. That said deed was thereafter recorded in book 24 at page 498 in the records of the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed is herewith filed and made a part of this Bill as "Exhibit A."

Eighth.

That on the 16th day of August, 1907, Stanford Berryhill executed and delivered to the defendant herein his certain deed wherein he did purport to sell and convey unto the said defendant all his right, title, claim and interest in and to the above described lands. That thereafter the said deed was filed for record and was recorded in book 24 at page 492 of the records in the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed is herewith filed as "Exhibit B", and made a part of this Bill.

Ninth.

That on the 21st day of August, 1907, Columbus Berryhill did execute and deliver to the said defendant his certain deed whereby he did purport to sell and convey unto the said defendant
107 all his right, title, claim and interest in and to the above described lands. That said deed was thereafter filed for record and was recorded in book 24 at page 525 of the records now in the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed is herewith filed as "Exhibit C" and made a part of this Bill.

Tenth.

That on the 16th day of August, 1907, Theodore Berryhill did execute and deliver to the said defendant his certain deed whereby he did purport to sell and convey unto the said defendant all his right, title, claim and interest in and to the above described lands. That said deed was thereafter filed for record and was recorded in book 24 at page 494 of the records now in the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed id herewith filed as "Exhibit D" and made a part of this Bill.

Eleventh.

That on the 16th day of August, 1907, William Berryhill did execute and deliver to the said defendant his certain deed whereby he did purport to sell and convey unto the said defendant all his right, title, claim and interest in and to the said above described lands. That said deed was thereafter filed for record and was recorded in book 24 at page 496 of the records now in the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed is herewith filed as "Exhibit E" and made a part of this Bill.

108 Twelfth.

That on the 16th day of August, 1907, Mary Keifer, joining with her husband, Charley Keifer, did execute and deliver to the said defendant their certain deed whereby they did purport to sell and convey unto the said defendant all their right, title, claim and interest in and to the above described lands.

That said deed was thereafter filed for record and was recorded in book 24 at page 501 of the records now in the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed is herewith filed as "Exhibit F" and made a part of this Bill.

Thirteenth.

That on the 20th day of August, 1907, Josie Morton, joining with her her husband, Thomas Morton, did execute and deliver to said defendant their certain deed whereby they did purport to sell and convey unto the said defendant all their right, title, claim and interest in and to the above described lands.

That said deed was thereafter filed for record and was recorded in book 24 at page 500 of the records now in the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed is herewith filed as "Exhibit G" and made a part of this Bill.

Fourteenth.

That on the 18th day of October, 1907, Airy Anne Berrhill did execute and deliver to the said defendant her certain deed whereby she did purport to sell and convey unto the said defendant all her right, title, claim and interest in and to the above described lands.

That said deed was thereafter filed for record and was re-
109 corded in book 28 at page 523 of the records now in the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed is herewith filed as "Exhibit H" and made a part of this Bill.

Fifteenth.

That the said defendant under and by virtue of the said deeds executed to him *and* aforesaid, claims some interest to the lands adverse to this complainant, and that the said defendant is without any right, whatever, and has no right, estate, title or interest in or to the said lands or any part thereof, and that the said deeds and the record thereof constitute clouds upon the title of the complainant in and to his interest as herein set forth in and to the above described lands.

In consideration whereof, and inasmuch as this complainant can have no adequate remedy at law, and to — end therefore that the defendant herein may, if he can, show why the complainant should not have the relief herein prayed, and may make a full disclosure and discovery of all the matters aforesaid, and to the best of his remembrance, knowledge, information and belief, full, true, direct and perfect answer make to the matters and things hereinbefore stated and charged, this compiainant prays;

First. That the defendant be required to set forth his right, title and interest, if any he has, in and to the above described lands.

Second. That this honorable court by a proper decree herein adjudge the complainant to be the owner in fee of an undivided one-third interest in and to the above described lands, and that the defendant has no right, valid claim or title therein, nor any interest whatsoever in said premises.

Third. That the title and interest of the complainant in
110 said lands be quieted and that the said defendant be perpetually barred and enjoined from setting up or asserting any title or interest in said premises adverse to the title and interest of this complainant.

Fourth. That the deed hereinbefore mentioned and executed by the said Mary E. Lee Keifer on August 20, 1907, and the deed excuted as aforesaid by Stanford Berryhill on August 16, 1907, and the deed executed as aforesaid by Columbus Berryhill on August 21, 1907, and the deed executed as aforesaid by Theodore Berryhill on

August 16, 1907, and the deed executed as aforesaid by William Berryhill on August 16th, 1907, and the deed executed as aforesaid by Mary Keifer and Charley Keifer, her husband, on August 16, 1907, and the deed executed as aforesaid by Mrs. Josie Morton and Thomas Morton, her husband, on August 20, 1907, and the deed executed as aforesaid by Arie Anne Berryhill on October 18, 1907, all be delivered up to be cancelled as clouds upon the title of the complainant herein.

Fifth. That the court grant to the complainant your writ of subpœna directed to the defendant, D. A. McDougal, and to such others as shall in the discretion of the court appear necessary to the hearing and final determination of this cause, commanding them on a day certain to appear and answer to this bill of complaint, but not under oath. An answer under oath is hereby expressly waived; and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience; and that the complainant have such other and further relief to which in equity and good conscience he may be entitled.

____ ____,

____ ____,

Solicitors for Complainant.

111 "EXHIBIT B."

In the United States District Court for the Eastern District of Oklahoma.

No. 1878.

JOHN V. MCKAY, Complainant,

vs.

D. A. MCDOUGAL, Defendant.

Answer.

Comes the defendant, D. A. McDougal, and for his answer to the bill of complaint filed and exhibited against him herein, states and shows unto the Court:

I.

That the defendant in this suit, D. A. McDougal, has brought an action in the district court of Tulsa County, State of Oklahoma, against the complainant in this action, John V. McKay, and that Edmond McKay and Perry McKay, who own a two-thirds interest in said lands as tenants in common with the said John V. McKay, complainant in this action, are made parties defendant in said action; and that Albert W. Shulthis, who is in possession of said land by virtue of a purported oil lease from the said John W. McKay, Edmond McKay and Perry McKay, is also a party defendant. Defendant alleges that said Edmond McKay and Perry McKay are

citizens and residents of the state of Oklahoma and of the Eastern District of said state, and that this defendant, D. A. McDougal, is also a resident of the state of Oklahoma and of the Eastern District thereof, and that the said District Court of Tulsa County,
112 State of Oklahoma, has jurisdiction to try and determine all the matters in controversy between and among all of said parties and to give a full and complete relief. Defendant alleges that this suit was brought by the complainant, John V. McKay, for the purpose of defeating the jurisdiction of the said District Court of Tulsa County, State of Oklahoma. Defendant alleges that if he is compelled to defend this action in this court that it will cause him a great deal of expense and trouble and will not in any way shorten or make less expensive the suit in the District Court of Tulsa County, and that should this court try this case that it will cause a multiplicity of suits with added expense and vexation, and that the comity, which exists between the State and the Federal Courts requires, as he believes, that this case be dismissed out of this court and that the complainant in this action be required to litigate the question involved in the action pending in the said district court of Tulsa County. Defendant alleges that this suit was brought at the instigation of the said Edmond McKay and Perry McKay and that they have charge of the conduct of this suit and that the complainant, John V. McKay, in bringing this suit is acting upon their advice, both as to where it should be brought and as to the attorneys that should be employed; and that the said Edmond McKay and Perry McKay actually employed the counsel appearing in this action for the complainant, John V. McKay, and that though nominally this is a suit between John V. McKay and the defendant D. A. McDougal, and really and substantially Edmond McKay and Perry McKay are interested in the suit in that they hope to obtain a decision in this action that will benefit them in their suit in said court.

113 II.

That whether the complainant, John V. McKay, is now and was at the date of the institution of this suit a citizen and resident of and within the State if Missouri, this defendant is without information; but the defendant admits that D. A. McDougal is a citizen and resident of that part of the State of Oklahoma now comprising the Eastern District thereof.

III.

The defendant admits that in the month of May, 1901, there was born to George Franklin Berryhill and Clementine Berryhill, his wife, a son named Andrew J. Berryhill; that George Franklin Berryhill was a Creek Indian citizen of mixed blood, and that Clementine Berryhill was at no time a citizen of the Creek Nation; he admits that Andrew J. Berryhill departed this life in the month of November, 1901, intestate and unmarried leaving no issue and no brothers or sisters surviving him. Defendant admits that on or about the 8th of October 1902 the name of Andrew J. Berryhill

was duly placed on the approved Indian roll of the Creek Nation, but denies that thereafter there was allotted by the Commission to the Five Civilized Tribes, to the heirs of Andrew J. Berryhill deceased the East Half of the Northwest Quarter of the Northeast Quarter and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section Thirteen (13) Township Seventeen (17) North, Range Twelve (12) East, in Tulsa County, Oklahoma, but states that said land was duly allotted by said Commission in the name of Andrew J. Berryhill, deceased, and a certificate of allotment was issued therefor and that thereafter, on or about the 10th day of October, 1905, there was issued a deed or patent
114 for said lands, by the United States of America and the Creek Nation, whereby said lands were conveyed to the heirs of Andrew J. Berryhill, deceased, but the heirs of said Andrew J. Berryhill being in no manner named in said deed or patent, nor any description or particular designation of who said heirs were, being given or set forth therein; and this defendant admits that said deed or patent was duly approved by the Secretary of the Interior and recorded as in complainant's bill alleged.

IIII.

This defendant denies that at the date of the death of Andrew J. Berryhill he left surviving him as his only heir his father George Franklin Berryhill, and states that said Andrew J. Berryhill at the date of his death left him surviving uncles and aunts as follows: Martha A. Lee Keifer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Keifer and Josie Morton and that upon the death of Andrew J. Berryhill the lands mentioned and described herein descended to his father, George Franklin Berryhill and said uncles and aunts, the said George Franklin Berryhill taking a life estate and no more and the said uncles and aunts taking a fee simple title to said premises subject to a life estate in George Franklin Berryhill.

V.

This defendant denies that on the 5th day of June, 1906, or ever at any time the said George Franklin Berryhill was the owner in fee of the lands in complainant's bill described, and denies that George Franklin Berryhill ever at any time owned more than a life estate in said lands.

115 VI.

Defendant admits that a deed from Edmond McKay and Perry McKay joined by their wives, Florence McKay and Gusta McKay conveying an undivided one-third interest in and to the lands described in the bill in this action was executed to the complainant and recorded as alleged in said bill; but defendant denies that by virtue of said conveyance the complainant is the owner in fee of an undivided one-third interest in and to the lands described in said bill. Defendant alleges that Edmund McKay, and Perry McKay

never had more than a life estate in said land and that the complainant, John V. McKay, only received an undivided one-third interest in the life estate owned by the said Edmund McKay and Perry McKay, and defendant denies that John V. McKay is the owner of an undivided interest in the fee to said lands, and denies that he has any claim or right to any greater estate than an undivided one-third interest in life estate therein.

VII.

This defendant denies that complainant is in possession of the lands and premises described in complainant's bill herein, and denies that he ever was at any time in possession of said lands and premises, and denies that the matter in dispute herein, exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars, and states that the interest of complainant could not in any event be more than an undivided one-third interest in a life estate in said property, which would be of much less value than the sum or amount of Three Thousand Dollars.

VIII.

Defendant admits the execution and delivery of the deed from Martha E. Lee Kiefer and the record thereof, as set forth in
116 the 7th paragraph of complainant's bill, and that Exhibit "A" is substantially a copy of said deed; and admits the execution and delivery to him of the deed from Stanford Berryhill and the record thereof as set forth in the 8th paragraph of the complainant's bill and that the Exhibit "B" is a substantial copy thereof; and admits the execution and delivery to him of the deed from Columbus Berryhill and the record thereof as set forth in the 9th paragraph of the complainant's bill and that Exhibit "C" is a substantial copy thereof; and admits the execution and delivery to him of the deed from Theodore Berryhill and the record thereof set forth in the 10th paragraph of the complainant's bill and that Exhibit "D" is a substantial copy thereof; and admits the execution and delivery to him of the deed from William Berryhill and the record thereof as set forth in the 11th paragraph of the complainant's bill and that Exhibit "E" is a substantial copy thereof; and admits the execution and delivery to him of a deed from Mary Keifer and the record thereof as set forth in the 12th paragraph of the complainant's bill and that Exhibit "F" is a substantial copy thereof; and admits the execution and delivery to him of a deed from Josie Morton and the record thereof as set forth in the 13th paragraph of the complainant's bill and that Exhibit "G" is a substantial copy thereof; and admits the execution and delivery to him of a deed from Airy Anne Berryhill and the record thereof as set forth in the 14th paragraph of the complainant's bill, and that Exhibit "H" is a substantial copy thereof.

IX.

This defendant admits that under and by virtue of the deed mentioned in the last preceding paragraph, he claims an interest in the

lands mentioned and described in complainant's bill, and
117 says that under and by virtue of these deeds he is the owner of the fee simple title to said lands subject only to a life estate in Edmond and Perry McKay; and this defendant denies that said deed and the record thereof constitute a cloud upon the title of the complainant in and to his interest in said lands, and denies that complainant has any title to said lands or any interest therein or thereto.

Wherefore: Having fully answered, defendant prays that the bill of complaint exhibited herein against him be dismissed at complainant's costs.

——— ———,
——— ———,
Solicitors for Defendant.

STATE OF OKLAHOMA,
County of Creek, ss:

I, D. A. McDougal, having been first duly sworn upon oath state that I am the defendant in the foregoing suit; that I have read the foregoing answer, and that the matters and things set forth in said answer are true.

——— ———.

Subscribed and sworn — by me this — day of June, 1910.

——— ———,
Notary Public.

My Commission expires ———.

118 On the back of which agreed statement of facts appear the following endorsements: No. 3528. D. A. McDougal, Plaintiff, vs. Edmond McKay, et al., Defendants. Agreed statement of facts. District Court, State of Oklahoma, County of Tulsa. Filed Mar. 10, 1914. W. W. Stuckey, Clerk. Ramsey & Thomas, Muskogee, Okla., Attorneys for ——— ———.

119 Judge ROSSER: We have nothing further to offer.
Mr. THOMAS: Defendants rests.
The COURT: The decree will be of course in favor of the defendants practically upon the pleadings and upon the exclusion of the evidence offered. I am satisfied all these things could be proven if it hadn't been that the Supreme Court had decided it. I think it is true, universally understood, that the members of the bar held the same opinion as you adhere to but I don't think they have got the power to overrule our court of last resort.
The above are all the proceedings had on the trial of the above entitled cause.
The depositions of N. A. Gibson J. C. Stone, Guy L. Andrews and Jean P. Day, and the exhibits attached to N. A. Gibson's deposition appear on the pages following:

120 In the District Court of Tulsa County, State of Oklahoma.

No. —.

D. A. McDougal, Plaintiff,
vs.
Edmond McKay, Perry McKay, John V. McKay, and Albert W. Shulthis, Defendants.

Stipulation.

It is hereby agreed and stipulated by and between the attorneys for the respective parties in the above styled and numbered cause that depositions of witnesses may be taken at the office of Rosser & Cochran in the City of Muskogee, in Muskogee County, Oklahoma on the 5th day of March, A. D. 1914, between the hours of eight o'clock A. M. and six o'clock P. M. and that if the taking should not be completed on that day that it may be continued from day to day at the same place and between the same hours until completed, and said attorneys respectively waive service of notice of said taking;

It is further stipulated that said depositions may be taken in short hand and afterwards transcribed, and both parties waive the signing of said depositions and agree that same may be read in evidence, subject to objections on account of incompetency, irrelevancy or immateriality, without the signatures of said witnesses.

ROSSER & COCHRAN,
Attorneys for Plaintiff.
RAMSEY & THOMAS,
Attorneys for Defendants.

121 In the District Court of Tulsa County, State of Oklahoma.

No. —.

D. A. McDougal, Plaintiff,
vs.
Edmond McKay, Perry McKay, John V. McKay, and Albert W. Shulthis, Defendants.

Depositions of N. A. Gibson, Taken on the 5th Day of March, 1914, in Accordance with the Foregoing and Attached Stipulation.

Appearances:

Rosser and Coe-ran for Plaintiff.
Ramsey and Thomas for Defendants.

Thereupon the plaintiff produced N. A. Gibson who after being duly sworn, testifies as follows:

Q. What is your name?
A. N. A. Gibson.

Q. What is your occupation?
A. Lawyer.
Q. Live in Muskogee?
A. I do.
Q. How long have you been in the practice here?
A. A little over twenty years.
Q. During that time what has been the nature of your practice?
A. Principally civil business.
Q. Have you had considerable land practice?
A. I have had a great deal, involving land titles, ever since the allotment of lands here.
Q. Are you familiar with the case of Shulthis vs. McDougal et al.?
A. Yes, sir.
Q. Did you have occasion prior to the rendition of that opinion to advise your clients as to whether or not an allotment in one of the Five Civilized Tribes was a new acquisition or an ancestral estate?

122 A. Yes, I did.

Q. What did you advise your clients upon this question prior to that decision?
A. That in my opinion it was a new acquisition.
Q. Did you know what the general concensus of opinion of the bar of the Indian Territory was, prior to that decision?
A. I think so.
Q. What was the opinion?
A. Generally that Indian allotments were new acquisitions.
Q. You mean by that——
A. I mean a very great majority of the lawyers with whom I ever discussed the matter or who I ever heard discuss it, were of the opinion that these titles were new acquisitions. In fact, I don't recall ever to have heard more than two lawyers contend that they were ancestral estates.
Q. After that opinion was rendered you continued to advise your clients with regerence to the land titles?
A. Yes, sir.
Q. After the opinion was rendered, what course of action did you advise where people were purchasing land which had been allotted to Indians who died without issue, leaving surviving them a parent or parents and collateral kindred, as to who they should buy from?
A. I continued to advise them that they should at all times procure conveyances, not only from the parent, but also from the collateral kindred, and this course of advice continued until the decision of the Oklahoma Supreme Court in the Pigeon v. Buck case, which was decided about May, 1913, since which time I have advised them that in my opinion the law as decided by that case would be held conclusive and have advised them it was no longer necessary to take conveyances from the collateral kindred.

123 Q. Do you know what the practice of other lawyers in the Indian Territory side of Oklahoma has been with reference to this question since the Shulthis decision?

A. I cannot say that I know enough about the practice of other lawyers to state the uniform rule.

Q. Bearing in mind the act of April 21, 1904, and the act of April 26, 1906, and the Act of May 27, 1908, and bearing in mind that the opinion of Shulthis vs. McDougal, et al., was rendered June 9, 1909, and appealed to the Supreme Court of the United States and dismissed for want of jurisdiction on the 7th day of June 1912, what proportion of the titles where this question was involved, has been purchased on the theory that the parent only owned a life estate and what proportion on the theory that parent owned the fee?

A. I should say that a very large proportion, probably 95% of all lands purchased from heirs of deceased Indian allottees have been purchased on the theory that the parent inherited the life estate only and not the fee.

That is all.

Cross-examination by Mr. THOMAS:

Q. The fact is that every lawyer and practically every man engaged in the buying and selling of Indian land is more or less skeptical about every decision until it has been passed on by the Supreme Court of the United States?

A. Yes sir.

Q. The decision in the Shulthis-McDougal case and in the Pigeon-Buck case, are given about the same consideration and the same following as any other decision of the Circuit Court of Appeals or the Supreme Court of Oklahoma relative to Indian Land titles, are they not?

124 A. Yes, I think about the same.

Q. Your statement to the effect that probably 95% of the land purchased from heirs of Indian Allottees were purchased on the theory that they were newly acquired estates, is made from what basis?

A. Simply from observation of the very great number of titles in which I have had occasion to investigate. The matters in which my clients were interested and from observation generally.

Q. But more particularly as a result of your experience in your practice?

A. Yes.

Judge ROSSER:

Q. You were acquainted with S. T. Bledsoe?

A. Yes, sir.

Q. You know where he practiced law prior to going to Oklahoma City?

A. Yes, he was at Ardmore for *q* number of years.

Q. Do you know the extent and nature of his practice down there?

A. Very large and general, involving a great many matters connected with the title to Indian lands.

Q. What was his reputation as a lawyer?

A. Very good, indeed.

Q. You are acquainted with his book or books entitled "Indian Land Laws"?
A. Yes, sir.
Q. Do you know whether the Bar of the state generally have bought this book, or rather this work, or not?
A. I think they have generally, yes.
Q. Are you a member of the State Bar Association?
A. I am.
Q. You are acquainted with me, your questioner?
A. Yes sir.
Q. Do you know that in Mr. Bledsoe's book Indian Land Laws he challenges the decision of Shulthis vs. McDougal, et al.?
A. That is my recollection.
Q. Did you know that I read *and* argument before the Bar
125 Association in which I made an assault on that decision?
A. Yes, I heard the paper read.
Q. Do you know how many members there are in the Bar Association?
A. Probably two hundred. I don't know how many.

The plaintiff here offers in evidence Sec. 62. 109 and 127 First Edition of Bledsoe's Indian Land Laws, Sec. 244 of Second Edition of Bledsoe's Indian Land Laws; also article read by M. E. Rosser before the Bar Association on Feb. 15, 1910, and they are marked respectively Exhibits A, B, C, D, & E and are hereto attached.

Mr. THOMAS:

Q. You were familiar with Mr. Bledsoe's first edition Indian Land Titles?
A. Yes, sir.
Q. In that work he expressed his opinion as to the ultimate disposition of a great many of our questions arising over Indian Land titles which at the time of the publication had not been decided by any court of last resort.
A. Yes, I think that is true.
Q. Don't you know it to be a fact that since the publication of that edition, the court of last resort has disagreed with Mr. Bledsoe?
A. I think that is true.

Whereupon the further taking of depositions was continued until the 7th day of March 1914, at the same place and between the same hours.

126 On this 7th day of March, the taking of depositions in the above styled and numbered cause was resumed in accordance with the agreement of the parties and the continuance, and the plaintiff appearing by his attorney- Rosser and Cochran and the defendants appearing by their attorneys Ramsey & Thomas, thereupon the plaintiff produced J. C. STONE, who after being duly sworn, says:

Direct examination by Judge ROSSER:

Q. What is your name?
A. J. C. Stone.

Q. You live in Muskogee?
A. I do.
Q. Are you a member of the bar, a lawyer?
A. I am.
Q. How long have you been engaged in the practice of law?
A. About fifteen years.
Q. At what places have you practiced law in Oklahoma or the Indian Territory?
A. At Okmulgee and at Muskogee.
Q. How long did you practice at Okmulgee?
A. I located there in June 1902, stayed there six years, came to Muskogee and have been here about six years.
Q. Okmulgee and Muskogee are both in the Creek Nation?
A. They are.
Q. What has been the nature and extent of your practice, Mr. Stone?
A. I have been actively engaged as a lawyer all these years, principally in land matters.
Q. You were offered a position as a member of the Supreme Court Commission of the State of Oklahoma some months ago by the Supreme Court itself, were you not?
A. I was.
Q. You declined that position because you preferred to remain in the practice?
A. Yes, sir.
127 Q. You are familiar with the decision in the case of Shulthis vs. McDougal et al., reported in Federal 170, at page 529?
A. Yes, I have examined that several times. I examined it as soon as it was published I think.
Q. Prior to the publication of that decision, what had been your custom in advising clients with reference to what are called Indian allotments, as to whether they were new acquisitions or ancestral estates?
A. I had advised them that they were new acquisitions.
Q. Do you recall what had been the general consensus of opinion of the bar of Oklahoma prior to that decision as to whether they were new acquisitions or ancestral estates:
A. I think I do. I believe I could safely say I know the views of a great many lawyers, particularly the bar of the Indian Territory.
Q. In the Creek Nation?
A. Yes, sir.
A. What were they?
A. They held that the allotments were new acquisitions and descended as such under the Arkansas law put in force here and as is set forth in the Kelly-Ayers case reported in 15 Arkansas.
Q. Since that opinion was handed down, what have you advised your clients when they were purchasing inherited lands, lands inherited from allottees, as to the steps they should take to get title?
A. Until the matter was passed upon by the Supreme Court of Oklahoma, following the Shulthis case, I advised my clients that they

should save themselves on both theories, as it was uncertain what the result might be.

Q. You say "save themselves on both theories". What do you mean by that?

A. That is to say, they should take conveyance so as to ac-
128 quire the title in the event the allotment is finally held to be an ancestral estate.

Q. In other words, both from the parent and from the collateral heirs?

A. Yes, sir.

A. Mr. Stone, bearing in mind the verious Acts of Congress affecting restrictions on Indian Lands, that is, the Act of April 21, 1904, April 26, 1906, May 27, 1908, and also bearing in mind that the opinion of the Circuit Court of Appeals in the Shulthis case was rendered *in* June 9, 1909, and the decision of the State Supreme Court was rendered in May, 1912 (I believe that was the date), what portion of lands which came without the purview of that decision would you say had been purchased on the theory that they were new acquisitions and what proportion on the theory that they were ancestral estates?

A. My opinion is, that all purchases prior to the Shulthis case were taken on the theory that the allotments were new acquisitions and after the Shulthis case I think there were some lawyers who advised their clients that they could safely follow the Shulthis case, but I believe the general practice was to demand conveyances from the collateral heirs until the Supreme Court followed the Shulthis case.

Q. With reference to the date of that decision, did you say that more inherited lands were sold before that decision or has been sold since?

A. A great part of it was sold before the Shulthis case.

Cross-examination by Mr. THOMAS:

Q. It is generally conceded, Mr. Stone, isn't it, that the decision of the Circuit Court of Appeals in the case of Shulthis vs. McDougal et al., was a very salutatory decision?

A. I believe that conclusion has been reached. At first very few lawyers, in my opinion, accepted that opinion as solid, but
129 they gradually came into the belief that it was.

Q. You don't get my meaning exactly. Isn't it generally conceded that the decision in the case of Shulthis *bs*. McDougal was extremely beneficial to all inherited titles in the point of making the inherited land more valuable?

A. In my opinion the bar generally accepted that decision as pro*b*iding a *s*umpler method of descent and therefore a simpler method of determining the — of the inherited title.

Q. And don't you know from your own experience in passing on inherited titles that where you did consider an allotment as a new acquisition, that then in a great many cases it would be almost impossible to, with any degree of certainty, tell whether or not you had acquired all of the collateral heirs because of the lax condition of domestic relations heretofore ex*h*isting in the Five Tribes.

A. I think all lawyers experienced difficulty in that respect. I did myself, considerable difficulty.

Q. With reference to the percent of titles which were bought on the theory that they were new acquisitions, the fact is that the question as to whether these lands in the Creek Nation were new acquisitions or ancestral estates was almost entirely lost prior to November 16, 1907, the date of the admission of Oklahoma as a State?

A. Between April 24, 1904, was the period of greatest activity in the sale of inherited lands and therefore that was the period when the most difficulty arose.

Q. You were familiar with the decision of the Supreme Court of Oklahoma in the Pigeon-Buck Case?

A. Yes, sir.

Q. In that case you know that the Supreme Court of Oklahoma follows the opinion of the Circuit Court of Appeals in the
130 Shulthis-McDougal case?

A. I so understand.

Q. Don't you know that since the decision of the Supreme Court of Oklahoma in the case of Pigeon vs. Buck, at least a very large per cent of the lawyers have given it as their opinion that where a Creek allottee died intestate, and unmarried, without issue, that the parent inherited the entire interest in the land?

A. I expect they have done so.

Judge ROSSER:

Q. The land that was purchased prior to statehood and prior to the Shulthis decision on the theory that it was a new acquisition, was purchased both from the parents and the collateral heirs of course?

A. Yes.

Q. Do you know how the consideration, the full consideration was divided as between the parents by the supposed owners of the fee simple?

A. In many cases it was a matter of agreement between the parent and the others heirs.

That is all.

131 *Certificate.*

I, Ruth Lyons, a Notary Public within and for the County of Muskogee, State of Oklahoma, do hereby certify that the above named witnesses were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in the case aforesaid, and that the depositions by them given were reduced to writing by me, a disinterested person, and the same were taken on the 5th day of March, 1904, and the 7th day of March, 1914, respectively between the hours of 8 o'clock A. M. and 6 o'clock P. M. of the said days, at the office of Rosser and Cochran, in the City of Muskogee, in the County of Muskogee, State of Oklahoma, and that I am not attorney

or a relative of either of said parties, or otherwise interest- in the event of this action.

[SEAL.] RUTH LYONS,
Notary Public.

My commission expires Oct. 29th, 1917.

132 *Exhibits to the Deposition of Mr. N. A. Gibson.*

EXHIBIT "A."

"Are the lands of the allottees of the Chickasaws and Choctaws upon their death ancestral of a new acquisition under the Arkansas statute of descent and distribution?

This is a most important question, because the heirs who take if the estate is ancestral are different from those who take if the estate is a new acquisition. It has been held both by the Circuit Court of Appeals for the Eighth Circuit (Ligonet — al. v. Johnston et al., 164 Fed. 672) and the Supreme Court of the United States (Stephens v. Cherokee Nation, 174 U. S. 488) that the lands of the Choctaw and Chickasaw Nations are public lands "held in trust for the members of the tribes * * * only in the broad, comprehensive sense in which the public property of any representative government is in trust for the welfare of its people?

If the unconditional fee were in the members of the tribe and allotment meant only the partition of an estate, the estate received by the allottee would be ancestral. Such is not the case. The estate held by a member previous to allotment was a mere right of possession and could be alienated only by a member of the tribe. The estate received by the allottee is an absolute fee simple including the United States' possibility of reversion. The estate thus received by the allottee is unquestionably a much greater and more valuable one than his previous possessory right. He takes by deed or patent from the governor of the Chickasaw Nation and the principal chief of the Choctaw Nation, and not by inheritance. He takes without regard to whether his father and mother be living or dead.

133 It has been the practically unanimous opinion of lawyers residing in the Eastern District of Oklahoma concurred in by the Writer that such an estate is a new acquisition. This opinion is based upon the decisions of the Supreme Court of Arkansas construing this statute prior to its adoption and the decisions of other courts construing like statutes.

Recently the Circuit Court of Appeals for the Eighth Circuit in affirming the judgment of the lower court in Shulthis v. McDougal et al., 162 Fed. 331, held the estate of an allottee to be ancestral and not a new acquisition, holding that if the allottee's "father was the only parent through whom he derived his right, * * * to the father the land should pass. If the mother had been a member of the tribe, then the land should probably pass to the parents equally."

An appeal will probably be prosecuted from the judgment of the

Circuit Court of Appeals to the Supreme Court of the United States. Notwithstanding the great respect entertained for the judgment of that court, the matter will not be regarded as settled until determined by the Supreme Court of the United States. (Keely's Heirs v. McGuire, 15 Ark. 555; Scull v. Vaugine et al., 15 Ark. 695; Magnus v. Arnold, 31 Ark. 103; Gallaway v. Robinson, 19 Ark. 396; Hogan et al. v. Finley et.ux., 11 S. W. 1035; Wheelock v. Simons, 86 S. W. 830; West et al. vs. Williams et al. 15 Ark. 682; Higgins v. Higgins et al., 48 N. E. 943; In Re Donahue, 36 Cal. 329.)"

134 EXHIBIT "B."

"It has been the opinion of the writer that the lands of an allottee of the Creek tribe of Indians are upon his death a new acquisition within the meaning of the Arkansas statute of descent and distribution; but the circuit court of appeals for the Eighth Circuit in the case of Shulthis vs. McDougal et al., not yet reported, has recently held such lands to be an ancestral estate and not a new acquisition."

EXHIBIT "C."

"As to whether the allotment of a deceased Cherokee is an ancestral estate or a new acquisition is determined by the same statute applicable to the lands allotted to the Choctaw and Chickasaw allottees. For a full discussion of this subject see section sixty-two dealing with the same subject applicable to the Choctaw and Chickasaw allottees."

EXHIBIT "D."

"Are lands of the allottees of the Five Civilized Tribes, after they pass upon death to their descendants, an ancestral estate or a new acquisition under the Arkansas statute of descent and distribution?

If the unconditional fee to the tribal lands had been in the members of the tribe, and allotments had meant only partition of an estate, the estate received by the allottee would have been ancestral. Such was not the case. The estate in the land held by a member previous to allotment was a mere right of possession and could be alienated only to a member of the tribe. The estate received by an allottee is an absolute fee simple, including the possibility of
135 reversion vested in the United States prior to allotment. The estate thus received by the allottee is a larger and more valuable one than his previous possessory right. He takes by deed or patent from the Governor or principal chief of his tribe, acting on behalf of the tribe and with reference to whether his father or mother or both be living or dead.

For nearly ten years it was practically the unanimous opinion of lawyers residing in the eastern district of Oklahoma that the estate of the allottee is a new acquisition and not an ancestral estate. This

was based upon uniform interpretation given to this statute by the Supreme Court of Arkansas under conditions somewhat similar, though not identical, to those in the Indian Territory.

About the time the bar regarded the matter as settled the Circuit Court of Appeals for the Eighth Circuit held the estate of an allottee of the Creek Nation to be ancestral, and not a new acquisition. A review of this decision was sought in the Supreme Court of the United States, but the case was dismissed for want of jurisdiction.

The Supreme Court of the state has very recently followed the construction given to the Arkansas statute of descent by the Circuit Court of Appeals for the Eighth Circuit, holding that the estate received by the allottee in allotment to be ancestral and not a new acquisition. The case involved the construction of the Arkansas statute of descent as applied to a full-blood Creek Indian who died July 12, 1905, after receiving her patent, intestate, leaving surviving her a husband, father, mother, sister, and two brothers, all full-
blood Creeks. The father, mother and husband joined in a
136 conveyance, and the sister and brothers brought suit to recover
the property and clear title thereto.

After quoting from the opinion of the Circuit Court of Appeals in the Shulthis vs. McDougal case, the court concludes as follows: 'Many titles to lands on the eastern side of this state have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property there * * *"

A writ of error has been sued out to have the judgment of the Supreme Court of the state in this cause reviewed by the Supreme Court of the United States.

It is extremely desirable that it be finally adjudged and without delay, whether the estate received by an allottee of the Five Civilized tribes is ancestral or a new acquisition, as the uncertainty of the law upon this subject is a source of great embarrassment in the development of the country. The author has never believed the rule prescribed in the case of Shulthis v. McDougal is sound or in harmony with either the language of the Arkansas statute or its interpretation prior to its extension over the Indian Territory. Neither does he believe that the rule there declared is capable of affording a solution of the difficulties arising out of the descent of allotted Indian lands.

The ancestral estate under the Arkansas statute is the estate of inheritance under the common law enlarged so as to include a give, grant or devise made by either of the parents. In such a case the estate descents to the children and their descendants, and in the absence of children of their descendants it ascends to those of
blood through whom the estate came, to the exclusion of those
137 of the bolld of the other parent. In the estates of inherit-
ance, in the absence of descendants, the property goes exclusively to the heirs of the deceased who are of the blood of the ancestor from whom the estate came, and in no event dies such an estate ascend to anyone who is not of the blood of the ancestor.

The new acquis-ion is substantially the estate by purchase of the common law, limited by having carved out of the same estate by

gift, grant or devise from the parents or either of them. In such a case the estate descends to the children and their descendants, and in the absence of children or their descendants ascends to the father for his lifetime, then to the mother for her lifetime, and then to the collateral kindred in fee; the fathers family being given preference only over the mother's family. Under the interpretation given to the Arkansas statute by the Circuit Court of Appeals for the Eighth Circuit and the Supreme Court of the state the courts and lawyers of the state are presented with the problem of following an ancestral estate through two separate and distinct lines of heirship, something unheard of in ancestral estates, and which probably will be difficult in practical application.

It will be observed that the Circuit Court of Appeals held that, inasmuch as one of the parents was not of Indian blood, the full title passed to that parent who was of Indian blood.

In the case decided by the Supreme Court of the state both parents were of Indian blood and survived the allottee, and it was held that the estate passed in equal moieties to the father and mother. Suppose that the father or the mother only had survived, would the entire estate — gone to the survivor, or would it have gone
138 half to the survivor and half to the heirs of the deceased parent? Upon the death of either of the parents without descendants, where both parents survive the allottee, by what rule is the right of descent to be determined?

These are only a few of the perplexing questions that will arise from the establishment of a rule creating two separate and independent ancestors to and from whom the descent of an ancestral estate must be followed."

139 *A New Acquisition as Appl'ed to Inherited Lands of the Five Civilized Tribes.*

By Judge M. E. Rosser, Poteau, Oklahoma.

The descent or devolution of property has always been, and probably will always be one of the chief concerns of a civilized government, and it would seem that the wisdom and experience of the ages would have devised a system before this that would render certain all questions affecting the title to lands by descent. But, notwithstanding the fact that the legislators of the world have been working on the subject since the beginning of individual ownership of land, questions continue to arise.

Mr. Jefferson wrote the Virginia Statutes of descent and distribution and in making the law upon that subject he changed entirely the old English system of having regard to the blood of the first purchaser and wrote a system founded on the affections of the heart. (Davis vs. Rose, 6 Rand. 355.) This system was intended to follow the natural flow of the affections and to require the property to descend in the same manner that natural affections would have disposed of it had the owner attempted to make disposition. The

system which he prepared was about the same as the Arkansas Statutes of descents and distributions and very little litigation ever arose with reference to its construction. But shortly after his code was adopted a statute was passed which provided in substance that where a child died without issue, having title to real estate derived by gift, defise or descent from one of his parents the whole should pass to his kindred on the side of his parent from whom it was derived, if any such kindred were living at the time of his death. Dr.
140 John B. Minor, commenting upon this statute in hes Institutes, says:

"This provision mars the symmetry of the original law of descent and comes out of Mr. Jefferson's "Quiver of choice arrows." It arose out of a solicitude to prevent estates going out of the families where they originally belinged and it is the only instance where any respect is paid by the statute to the blood of the first purchaser—and has given occasion to most of the litigation connected with our law descents."

The same desire to prevent estates from going out of families where they originally belonged actuated the early legislators of the state of Arkansas, and, after passing a general statute upon the subject, largely taken from the New York Code, but resembling the Virginia Statute, the state further provides that, "In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs, but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided." This statute was carried into Mansfield's Digest of the Statutes of Arkansas and was extended over and put in force in the Indian Territory by act of Congress. There is a great diversity of opinion as to when it took effect in the Choctaw and Chickasaw Nations so far is it concerns children who were living when their allotments were selected, but that is another story. From the time it did take effect, until Statehood, children of the various Indian Tribes were dying without descendants and the question as to whether or not their allotments were New Acquisitions affects
141 a large amount of land on the eastern side of the State and it is a very important one to the lawyers of the Indian Territory side.

It was the opinion of most of the bar of Indian Territory that the estate of an allottee was a new acquisition within the meaning of the Statute and the lawyers who studied the land question of that part of the State were, with a few exceptions, very much surprised when the Circuit Court of Appeals for the Eighth Circuit, in the case of Shulthis vs. McDougal, 170 Fed. 529, decided that the allotment of a member of the Creek Tribe of Indians was not a new Acquisition, but that it came from the father. Now lawyer who has studied the opinion of the Circuit Court of Appeals of the Eighth

Circuit will deny that it is a Court of Great Ability and no self-respectng lawyer will attempt a criticism of the opinion of that or any other Court except in the most respectful manner, but I believe that, if done with the proper respect which every member of the Bar owes to every respectable Court, any lawyer has the right in a Bar Association to differ from any Court and to point out to his brethren the reason for differing.

In the course of the opinion where this decision was made, Judge Amidon, who delivered the opinion of the Court, said:

"Among the people of Arkansas there was no way of acquiring land except by grant, gift, of inheritance. This was true even of lands acquired from the federal government under the public land laws. The patentee of such lands was always required to purchase the same either by residence and improvement, or the payment of a purchase price, or by these elements combined. It needs but a momen'ts thought to see that when this statute was applied to the lands of the Creek Nation it was applied to a subject matter entirely different from that which was in the mind of the legislature of Arkansas. The lands of that tribe fit into neither of the
142 classes mentioned in the statute. They did not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase. The tribal lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as public lands of the United States are held by the Nation. They constitute the home or seat of the tribe. Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property."

The opinion then argues at some length the question of the status of the allottee toward his land and then says:

"So ling as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue and the division of its property was far more kin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it cannot be said that the property which passed to and allottee is a new right or acquisition created by the allotment. The right to the allotment antedates the allotment and is simply given effect *to* by that act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe. It was his birthright. It came to him by the blood of his tribal parents and not by purchase. In applying the Arkansas statute we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands, not as a new acquisition, but as an inheritance from his parents as members of the tribe. His father was the only parent through whom he derived his right and to the father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the parents equally."

In the case of Eastern Cherokees vs. United States and Cherokee Nation, 117 U. S. 312, 29 Law Ed. 880, the Eastern Band of Cherokees sued for a proportionate part of the funds belonging to the Cherokee Nation, derived from the sale of certain lands, part of which were west of the Mississippi River. The Supreme Court denied the right to recover and among other things said:

"Their claim, however, rests upon no solid foundation. The lands, from the sale of which the proceeds were derived, belonged to
the Cherokee Nation as a political body, and not to its inde-
143 vidual members. They were held, it is true, for the common benefit of all the Cherokees but that does not mean that each member had such an interest as a tenant in common that he could claim a pro rata proportion of the proceeds of sale made of any part of them. He had a right to use parcels of the lands thus held by the Nation, subject to such rules as its governing authority might prescribe; But that right neither prevented nor qualified the legal power of that authority to dede the lands and the title of the Nation to the United States."

If the Nation as a political body could grant the lands of the tribe, the title of the individual members must have been very slender indeed. A tenant in common cannot have his right divested by a dded to which he is not a party.

In Stephens vs. Cherokee Nation and kindred cases, reported in 174 U. S. 445, Law Ed. 1041, the question of the constitutionality of the Citizenship Court was at issue. It was claimed by persons who had been admitted to citizenship in the various tribes by the United States Court in the Indian Territory that they had thereby obtained vested rights in the lands and moneys of the tribes, of which they could not be divested by a judgment of the Citizenship Court. In refuting this claim Mr. Chief Justice Fuller says:

"But in any aspect, we are of the opinion that the constitutionality of these acts in respect of the determination of the citizenship can not be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

In the case of Journeycake, cited by Judge Amidon in the Shulthis case, Mr. Justice Brewer, speaking of the interest of certain Delaware Indians in the lands of the Cherokees, said (155 U. S. 215, 39 Law Ed. 125):

"That interest being like that of the native Cherokees, limited to a mere occupancy of the tracts set apart for homes, with the right
to free use in common of the unoccupied portion of the
144 reserve, and the right to share in any future allotment."

A fee simple title to land is very different to that of a mere right of occupancy. A title which permits a man to hold his land in severalty and to seal and dispose of it is very different from a right of occupancy, especially when he cannot sell his interest in the land nor alienate it in any way, nor even transfer his right of occupancy except to one of the same tribe.

The case of J. E. Fleming, et al. vs. Green McCurtain, et al. is the celebrated or notorious suit brought by Webster Ballinger on behalf of several thousand persons claiming to be Choctaws and Chickasaws by blood for their share of tribal properties, asking to have a trust declared therein in their favor. Mr. Justice Holmes delivered the opinion of the Court on the 8th of November, A. D. 1909, and after stating the contention of the plaintiffs that the patent of 1842, founded on the treaty of 1830, of the lands described therein, provided that the Choctaw Nation was to have and to hold the same, "to them and their descendants, to inure to them while they shall exist as a Nation and live on it," liable to no transfer or alienation except to the United States, or with their consent, created the Choctaw Nation a trustee for them as descendants of the members of the tribe at the time of the grant, and that as beneficiaries of the trust thus created they could recover, says:

"As we cannot agree with this contention, it will be unnecessary to consider many of the further allegations of the bill. The foundation of the plaintiff's case is upon the words of the treaty and the patent we have set forth. Those words seem to us to convey a different meaning on their face—a meaning that could not be charged, but rather confirmed, if we were to refer at length to the earlier and later dealings with the tribes, which we shall not need to do."

145 The Court then proceeds to show that the conveyance was to the Nation, as such, and not to individuals.

But the plainest declaration of the status of the individual Indians towards the lands of the tribes is contained in the portion of the Circuit Court of Appeals of the Eighth Circuit, by one of the Judges who took part in the Shulthis case, in the case of Ligon vs. Johnston, 164 Fed. 670. In the case Judge Hook said with reference to the lands of the Choctaw Tribes:

"That the lands involved were public lands, belonging to the Choctaw and Chickasaw Nations and not to the individual members, has been assumed without contradiction from the inception of their titles through a long sequence of acts of Congress and treaties and agreements with the tribes. True, as contended, the title so held has frequently been referred to as being held in trust for the members of the tribes, but it is only so in the broad comprehensive sense in which the public property of any government is in trust for the welfare of its people. Until specific, private, individual rights attach pursuant to law the enforcement of such trusts must be at the bar of public conscience. They are not justificable by the courts.

As has just been shown by the Fleming case the title was not held in trust in any legal sense of the term.

It would appear, therefore, that the title to the lands of these tribes was in the various tribes as such in their political capacity, prior to the dates fixed by the various treaties at which or as of which, the rolls should be made up.

In the case of Hogan vs. Finley, 52 Ark. 55, it was decided that where a father, desiring to procure the title to certain lands belonging to the State and to give them to his son, procured a donation deed from the State to his minor son and paid the fees and expenses

necessary to obtaining the deed, the title so obtained was a new acquisition in the son, that the father took only a life estate in the lands and that he had no interest in the lands he could devise.
146 To the same effect is the case of Matness vs. Arnold, 31 Ark. 103. These cases, as well as the case of Kelly's heirs in 15 Ark., 555, had been the settled construction of the statute in Arkansas for years before the statute was adopted in the Indian Territory, and, in putting the statute in force in the Indian Territory, Congress undoubtedly intended to extend with it the construction that had been placed on it by the Supreme Court of Arkansas.

"Estate" signifies the condition or relation a man bears to his property, or his interest therein. It seems very clear that a mere right of occupancy, with a bare right to transfer to a member of the same tribe, is not the same estate as a fee simple title with full right of alienation, and the fact that by restrictions the right of alienation is postponed does not change the matter. It would seem that the new title made by the treaty, selection as an allotment and patent, made an entirely new estate in the land and that it was a new acquisition in the person who first received it. It is true, as stated by Judge Amidon, that the decedent received the land by virtue of his blood, but that is a condition of his getting the land and does not signify that he got the title from his father. It was mere evidence of his membership in the tribe and as a matter of fact many persons shared in the tribal lands who were not of Indian blood at all, but derived their rights by intermarriage or by adoption.

Judge Amidon does not claim that the father granted the land to the child, but expressly says that in Arkansas there was no way of acquiring land except by grant, gift or inheritance and then says that the lands of the Indians fit into neither of these classes. There are ways by which title to land can be obtained otherwise than by gift, grant or inheritance—for instance, by prescription or
147 escheat—but no way can be imagined by which a title can pass from father to son except in one of these three ways. The child in the case did not receive it as a gift from the father because the father never had it. He did not receive it by grant for the same reason and he did not get it by inheritance for the same reason and for the further reason that the father was not dead. To say that a man has inherited something implies that some one is dead. No man is heir to the living and in this case the father was living. The Shulthis case says that the land came by inheritance from the father, but to speak of the matter in this language unsettles all the use of terms as settled by the common law. It will be something new in the law of real property if a child can inherit land from the father and the father back from the child and still there be only one funeral in the family.

If the Indians were tenants in common of the tribal lands prior to allotment, then, where a wife died before her allotment was selected and it was selected in her name after her death, other conditions being satisfied, the husband would have taken curtesy under the Arkansas Law, and so as to dower in the allotment of

the Husband. All the Courts that have passed on these questions have held that no curtesy or dower existed and their decision is based on the fact that there was no tenancy in common prior to allotment and that the title created by the allotment was an entirely new estate.

No court of appeal- has decided these questions to my knowledge, but Judge Wm. H. H. Clayton of the Central District of Indian Territory, — is exceedingly well informed upon all Indian questions decided the matter prior to Statehood and I understand that Judge Clark of Oklahoma County has decided the same question in
148 the same way since Statehood. Unless the estate acquired by allotment is a new acquisition these decisions are wrong.

I will state that no matter is better settled under the decisions of Arkansas than that the tenancy in common gives the right of curtesy.

It would seem that the Indians prior to allotment stood in about the same relation to the tribal lands that a citizen of the United States does to the public lands of the United States. To be sure they had the right of occupancy, but the United States could give such right in the public lands to its citizens without conveying a title. The fact that member- of the tribe had occupied the lands gave no right in the lands except a preference in selecting their allotment in the portion upon which they had improvements and that preference was given by the treaty and was created by it.

The father never owned the lands which were allotted to the child and if the child had not been born neither the father nor any other member of the tribe could have owned its allotment. The part selected for the child would have become a part of the surplus unallotted lands of the tribe and at some glad day probably would have been sold and the proceeds, at some more indefinitely postponed time, paid pro rata to the members of the tribe. Neither the father nor other near relative of the trib would have gotten a cent more of the proceeds than a member who was in no way related to the child. The child did not inherit the lands from any person nor did any person give or grant them to the child. Then it must be a new acquisition.

The treaties fixed a day when all members of the tribe then liv-
ing should be entitled to share in the division of the lands,
149 moneys, and other property. The lands were divided between them just as the shareholders of a corporation might agree to dissolve the corporation and divide the property among the shareholders. Each shareholder would hold by a new and different title from that which had formerly existed in the corporation.

The individual allottee claimed title through no other person, but through the political society to which he formerly belonged; just as much as a new one as is created by patent from the United States, conveying some of the public lands to one of its citizens.

With a few notable exceptions, as stated above, the profession was very much surprised at the decision. Of course, the gentlemen who have been buying these Indian titles and taking a lease for five years (which they recorded), a power of attorney irrevocable for

twenty years, a quit claim deed (which they had recorded), and a warranty deed looked very pleasant, said it was what they had always said and went over to the recorder's office and filed their warranty deed for record. But none of them had expected it to the extent of paying anything like full value for the land. They had taken all these instruments under the belief that they were getting only a life estate.

What the final result of the matter will be remains to be seen. A gentleman of considerable prominence has said that a question is never settled until settled right. If the Shulthis decision is not right, will the matter get before the Supreme Court of the United States at an early day? Will our Supreme Court follow it? I will say in passing that I doubt seriously if that appeal will be decided by the Supreme Court. I am inclined to think that it will be dismissed on account of the manner in which the suit is brought.

150 How long will it take the decision to become a rule of property? It may take longer than is ordinarily the case for the reason that the parents have practically all sold, and, while warranty deeds were taken in many instances, all parties had the impression that the parent could only convey a life estate and full value was not paid.

If the Torrens Land System should be enacted into law in the State, as is advocated in some quarters of great influence in state councils, what would the register *to* with a title of the kind involved in the case and what would become of the System if after a few years the Supreme Court of the United States should decide to reverse the decision? These are some of the questions that arise with reference to the matters involved in the case.

Endorsements on the back of said depositions: In the District Court, Tulsa County, Oklahoma. D. A. McDougal, Plaintiff, vs. Edmond McKay, et al., Defendants. Depositions. District Court, State of Oklahoma, County of Tulsa. Filed Mar. 10, 1914. W. W. Stuckey, Clerk. Rosser and Cochrane, Attorneys for Plaintiff.

151 In the District Court of Tulsa County, State of Oklahoma.

D. A. McDOUGAL, Plaintiff,

vs.

EDMOND McKAY, PERRY McKAY, JOHN V. McKAY, and ALBERT W. SHULTHIS, Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-styled action that the depositions of Messrs. Guy L. Andrews and Jean P. Day may be taken upon the attached interrogatories before any officer authorized under the laws of the State of Oklahoma to take depositions, and it is agreed that all formalities as to notice of taking and as to form of certificate shall be and are hereby waived, and that the answers to said interrogatories may be

offered in evidence at the trial of the above styled action, subject to objections for irrelevancy, incompetency and immateriality.

Dated this 6th day of March A. D. 1914.

——— ———,
Attorneys for Plaintiff.
RAMSEY & THOMAS,
Attorneys for Defendants.

We waive the propounding of cross interrogatories.
RAMSEY & THOMAS,
Attorneys for Defendants.

152 In the District Court of Tulsa County, State of Oklahoma.

No. —.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY, PERRY McKAY, JOHN V. McKAY, and ALBERT W. SHULTHIS, Defendants.

Interrogatories to be Propounded to Mr. Guy L. Andrews, Witness for the Plaintiff in the Above-entitled Action.

Int. I. State your name, age, occupation and place of residence.

Int. II. If you answer that you are a practicing lawyer, state how long you have been a member of the bar and how long you have practiced in what is now Oklahoma.

Int. III. At what place or places in Oklahoma or Indian Territory have you practiced law?

Int. IV. State whether these places are located in the Choctaw, Chickasaw, Creek, Cherokee or Seminole Nations.

Int. V. In your practice have you had occasion to examine land titles and to try suits with reference to titles and lands in the Choctaw Nation? Have you had occasion to advise people with reference to the validity of titles in said Nation?

Int. VI. If you answer that you have had occasion to examine the land titles, try cases involving the title of lands in the Choctaw Nation and to advise people with reference to the validity of land titles in said nation, please answer to what extent.

153 Int. VII. Are you familiar with the decision of the Circuit Court of Appeals of the United States for the Eighth Circuit entitled Shulthis vs. McDougal and reported in 170 Fed. 529, 95 C. C. A. 615.

Int. VIII. If you answer that you are familiar with this decision, please state if you can, what was the general opinion of the bar of the Choctaw Nation prior to that decision, as to whether or not the allotments of a member of the Choctaw Tribe of Indians were new acquisitions or ancestral estates.

Int. IX. Since the opinion in Shulthis vs. McDougal referred to

in the preceding interrogatory, what has been your custom or practice with reference to advising clients upon titles where the same question is involved? State whether you have advised them to rely on this decision or to obtain conveyance from collateral heirs.

Int. X. Answer if you know what advice other lawyers in McAlester and in the portion of country where you are acquainted have usually given clients with reference to the validity of titles such as are involved in the Shulthis decision, since that opinion was handed down.

Int. XI. Bearing in mind the acts of April 21, 1904, April 26, 1906, and May 27, 1908, affecting the restriction upon alienation by members of the Five Civilized Tribes, and bearing in mind the fact that the opinion is Shulthis vs. McDougal was rendered June 9, 1909, that it was appealed to the Supreme Court of the United States where it was dismissed for want of jurisdiction May 7, 1912; what would you say was the proportion of titles descending from parents dying without issue leaving their parents, or one of them, surviving that had been purchased and paid for on the theory that the
154 parent owned the fee and what proportion upon the theory that the parent or parents only took a life estate.

ROSSER & COCHRAN,
Attorneys for Plaintiff.

155 In the District Court of Tulsa County, State of Oklahoma.

No. —.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY, PERRY McKAY, JOHN V. McKAY, and ALBERT W. SHULTHIS, Defendants.

Interrogatories to be Propounded to Mr. Jean P. Day, Witness for the Plaintiff in the Above-entitled Action.

Int. I. State your name, age, occupation and place of residence.

Int. II. If you answer that you are a practicing lawyer, state how long you have been a member of the bar and how long you have practiced in what is now Oklahoma.

Int. III. At what place or places in Oklahoma or Indian Territory have you practiced law?

Int. IV. State whether these places are located in the Choctaw, Cherokee, Chickasaw, Creek or Seminole Nations.

Int. V. What official positions have you held in the State of Oklahoma.

Int. VI. In your practice have you had occasion to examine land titles and to try suits with reference to titles and lands in the Choctaw Nation? Have you had occasion to advise people with reference to the validity of titles in said nation?

Int. VII. If you answer that you have had occasion to examine

land titles, try cases involving the titles of lands in the
156 Choctaw Nation and to advise people with reference to the validity of land titles in said Nation, please answer to what extent.

Int. VIII. Are you familiar with the decision of the Circuit Court of Appeals of the United States for the Eighth Circuit entitled, Shulthis vs. McDougal and reported in 170 Fed. 529, 95 C. C. A. 615?

Int. IX. If you answer that you are familiar with this decision, please state if you can, what was the general opinion of the bar of the Choctaw Nation prior to that decision, as to whether or not the allotments of a member of the Choctaw Tribe of Indians were new acquisitions or ancestral estates.

Int. X. Since the opinion in Shulthis vs. McDougal referred to in the preceding interrogatory, what has been your custom or practice with reference to advising clients upon titles where the same question is involved? State whether you have advised them to rely on this decision or to obtain conveyance from collateral heirs.

Int. XI. Answer if you know what advice other lawyers in McAlester and in the portion of the country where you are acquainted have usually given clients with reference to the validity of titles such as are involved in the Shulthis decision, since that opinion was handed down.

Int. XII. Bearing in mind the acts of April 21, 1904, April 26, 1906, and May 27, 1908, affecting the restriction upon alienation by members of the Five Civilized Tribes, and bearing in mind the fact that the opinion in Shulthis vs. McDougal was rendered June 9, 1909, that it was appealed to the Supreme Court of the United States where it was dismissed for want of jurisdiction May 7, 1912; what would you say was the proportion of titles descending from parents dying without issue leaving their parents, or one of them, surviving, that had been purchased and paid for on the theory that the
157 parent owned the fee and what proportion upon the theory that the parent or parents only took a life estate.

ROSSER & COCHRAN,
Attorneys for Plaintiff.

158 In the District Court of Tulsa County, State of Oklahoma.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Depositions of Witnesses to be Used in the Above-entitled Cause, Taken in the Offices of Andrews & Day, at McAlester, Oklahoma, on the 9th Day of March, 1914.

GUY L. ANDREWS, being first duly sworn, deposes and says:

In answer to Int. No. 1. My name is Guy L. Andrews, I am 42 years of age by occupation a lawyer and reside at McAlester, Oklahoma.

In answer to Int. No. 2. I have been a member of the bar since 1903 and having during all of that time practiced in what is now State of Oklahoma.

In answer to Int. No. 3. I have practiced law in the east side of the State of Oklahoma rather generally, my offices having been either at Wilburton, Oklahoma, or in McAlester, Oklahoma.

In answer to Int. No. 4. My offices have always been located in what was the Choctaw Nation.

In answer to Int. No. 5. In my practice I have had many occasions to examine land titles and quit- frequently to try law suites with reference to titles and lands in the Choctaw Nation, and I have often had occasion to advise people with reference to the validity of titles in the Choctaw Nation.

In answer to Int. No. 6. It would be hard to explicitly answer this question. There has not probably been a month in the
159 last eight years that I have not advised people with reference to the validity of land titles and in the trial of cases I probably have had something in the neighborhood of two or three actual trials per year, and five or six per year where suits would be filed or defended and settlements had without trial.

In answer to Int. No. 7. Yes.

In answer to Int. No. 8. The general opinion of the bar in the Choctaw Nation prior to that decision was that the allotments of a member of the Choctaw Tribe were new acquisitions. I feel quite sure that this belief met the approval of not less than ninety per cent of the members of the bar of the Choctaw Nation.

In answer to Int. No. 9. It has been my practice to wholly disregard the opinion in the case of Shulthis vs. McDougal. I have refused to pass titles and will yet refuse to pass them where this question is involved without conveyances from collateral heirs. During the time that I have been passing upon titles it has frequently occurred that persons holding titles on the theory of either line of descent have been presented to me. In the light of the McDougal case, I have, of course, required that they get conveyances or quit-claims upon the theory of an ancestral estate, but I have invariably required that they likewise obtain the conveyances or quit-claims from all collateral kindred before I would pass the title as good.

In answer to Int. No. 10. I only know what advice other lawyers in McAlester and in this portion of the country are giving from conversations with them and from an investigation of abstracts showing the procedure adopted, with the exception of one man in McAlester in the general practice I do not believe there is any attorney who advises his clients that titles had from the parents are free
160 from such grave doubt as to justify the expenditure of money for the titles. There is one attorney here who adopted that view prior to the Shulthis-McDougal decision and has consistently followed it, other than that so far as I know there has been no change in the policy of any of our lawyers. There are I think about sixty-five lawyers in the practice in McAlester.

In answer to Int. No. 11. It would be hard to say what the proportion of titles were that had been paid for on one or the other theories

I do know that I have been examining extracts for several years for several loan companies, as well as passing on them for prospective purchasers and during that time there has never been but one title that came to our office, attached to which was the written approval of a reputable attorney, that was based solely upon the theory that the land was an ancestral estate and unaccompanied by quit-claim or releases from collateral kindred and there have been a few that I have examined, where attention was called to the Shulthis-McDougal decision, accompanied by the statement to the effect that the holding of the Eighth Circuit was adverse to the view held by the majority of attoeneys in our country, but until such decision was given further effect from the Supreme Court of the United States it was deemed dangerous to accept titles unless not only the parents but collateral kindred joined in the conveyance, or otherwise released their claims. Indeed our Probate Court has sold and received money from minors on the theory that they had some interest, notwithstanding the decision, where the parents or purchaser was anxious to make unquestioned the title to allotments remaining in the hands of the
161 allottee at death. I don't believe that there are now as much as five per cent of the lands in our country that have been purchased from the heirs of decedents where the question was involved that was involved in this case that have purchased or held upon the strength of the rule of descent announced in the Shulthis-McDougal decision.

In the use of the words "lands" or "titles" I mean lands allotted to citizens of the Indian Tribes and titles derived by inheritance from the allottee.

GUY L. ANDREWS.

162 In the District Court of Tulsa County, State of Oklahoma.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Depositions of Witnesses to be Used in the Above-entitled Cause, Taken in the Offices of Andrews & Day, at McAlester, Oklahoma, on the 9th Day of March, 1914.

JEAN P. DAY, being first duly sworn, deposes and says:

Int. No. I. Ans. My name is Jean P. Day, I am forty years old and am engaged in the law practice and reside at McAlester, Oklahoma.

Int. No. II. Ans. I have been a member of the bar for fifteen years and have practiced for the past fourteen years in what is now the State of Oklahoma.

Int. No. III. Ans. At Poteau and McAlester.

Int. No. IV. Ans. Both these places are located in what was formerly the Choctaw Nation, Indian Territory.

Int. No. V. Ans. I was a member of the Code Commission with

Judge S. H. Harris, that revised the present statutes of the State of Oklahoma, commonly referred to as the Harris-Day Code.

Int No. VI. Ans. During the years I have been in the practice at the above named points I have had occasion to examine land titles and try suits with reference to titles in lands in the Choctaw Nation and also to advise people with reference to the validity of titles in said Nation.

Int. No. VII. Ans. The last ten years of my practice has
163 been fairly large and a very considerable portion of that practice has involved litigation upon land titles in the Choctaw Nation and in advising my clients with reference to the validity of land titles in said Nation.

Int. No. VIII. Ans. I am familiar with the decision of the Circuit Court of Appeals of the United States for the Eighth Circuit entitled, Shulthis vs. McDougal and reported in 170 Fed. 529, 95 C. C. A. 615.

Int. No. IX. Ans. Prior to that decision it was the opinion of very large majority of the bar of the Choctaw Nation that the allotments of a member of the Choctaw Tribe of Indians were new acquisitions.

Int. No. X. Ans. I only know what advice other lawyers in McAlester and in this portion of the country are giving from conversations with them and from an investigation of abstracts showing the procedure adopted. With the exception of one man in McAlester in the general practice I do not believe there is any attorney who advises his clients that titles had from the parents is free from such grave doubt as to justify the expenditure of money for the titles. There is one attorney here who adopted that view prior to the Shulthis-McDougal decision and has consistently followed it, other than that so far as I know thare has been no change in the policy of any of our lawyers. There are I think about sixty-five lawyers in the practice in McAlester.

Int. No. XI. Ans. It would be hard to say what the proportion of titles were that had been paid for on one or the — theories. I do know that I have been examining abstracts for several years for several loan companies, as well as passing on them for prospective
164 purchasers and during that time there has never been but one title thet came to our office, attached to which was the written approval of a reputable attorney, that was based solely upon the theory that the land was an ancestral estate and unaccompnied by quit claims or releases from collateral kindred and there have been a few that I have examined, where attention was called to the Shulthis-McDougal decision, accompanied by the statement to the effect that the holding of the Eighth Circuit was adverse to the view held by the majority of attorneys in our country, but until such decision was given further effect from the Supreme Court of the United States it was deemed dangerous to accept titles unless not only the parents but collateral kindred joined in the conveyance, or otherwise released their claims. Indeed our Probate Court has sold and received money from minors on the theory that they had some intherest, notwithstanding the decision, where the parents or purchaser was anxious to

make unquestioned the title to allotments remaining in the hands of the allottee at *its* death. I don't believe that there are now as much as five per cent of the lands in our country that have been purchased from the heirs of decedents where the question was involved that was involved in this case that have purchased or held upon the strength of the rule of descent announced in the Shulthis-McDougal decision.

Int. No. XII. Ans. It would be difficult for me to state since the handing down of the opinion in the case of Shulthis vs. McDougal what proportion of titles descending from parents dying without issue leaving their parents, or one of them, surviving, that had been purchased and paid for on the theory that the parent owned the fee and that the parent or parents only took a life estate. My observation has been, and my judgment is, that since that date a large majority of conveyances made have been such as the title would be good upon both theories of the law.

In the use of the words "lands" or "titles" I mean lands allotted to citizens of the Indian Tribes and titles derived by inheritance from the allottee.

JEAN P. DAY.

Certificate.

I, Jackman A. Gill, a Notary Public within and for the County of Pittsburg, State of Oklahoma, hereby certify that the above named Guy L. Andrews and Jean P. Day, witnesses whose names are severally subscribed to the foregoing depositions were by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the case aforesaid, and the depositions by them respectively subscribed were taken in shorthand and transcribed by Laura P. Mullins a disinterested and proper person and were subscribed by the respective witnesses in my presence and the same were taken on the 9th day of March, 1914, between the hours of eight o'clock A. M. and six o'clock P. M. of said day in the offices of Andrews & Day, in the town of McAlester, in the County of Pittsburg in the State of Oklahoma. That neither I, nor the said Laura P. Mullins, am an attorney for or related to either of said parties or otherwise interested in the event of said action.

[SEAL.] JACKSON A. GILL,
Notary Public.

My commission expires the 23 day of September, 1917.

Endorsements: District Court, State of Oklahoma, County of Tulsa. Filed Mar. 10 1914. W. W. Stuckey, Clerk.

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, Jo. D. Payne, Official Reporter of the District Court within and for the County of Tulsa, State of Oklahoma, do hereby certify that the above and foregoing is a full, true, correct and complete copy

and transcript of all the evidence offered or introduced on the trial of the above entitled cause.

JO. D. PAYNE,
Official Reporter.

168 And thereupon, on the same day, to wit, the 10th day of March A. D. 1914, the following judgment was entered in this cause.

169 In the District Court in and for Tulsa County, Oklahoma.

No. 3528.

D. A. McDougal, Plaintiff,
vs.
Edmond McKay, Perry McKay, John V. McKay, and Albert W. Shulthis, Defendants.

Journal Entry.

On this 10th day of March, A. D. 1914, came on to be heard the above entitled and number-cause ;and the plaintiff D. A. McDougal, appeared in person and by his attorneys, Messers. Rosser & Cochran and L. O. Lytle, Esq.; and the defendants, Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, appeared in person and by their attorneys, Messrs. Ramsey & Thomas, and all parties announced ready for trial and thereupon the Court heard the cause upon the petition and the exhibits thereto, the answer, the statement of counsel, the agreed statement of facts filed in the cause and the evidence offered.

And after hearing the cause and being well and sufficiently advised the Court finds that Andrew J. Berryhill, deceased, was a member by blood of the Creek Tribe of Indians; that the said Andrew J. Berryhill died in the month of November, 1901, intestate and unmarried leavin*t* no brothers, sisters or children surviving him; that he left surviving him his father, George Franklin Berryhill, and his mother, Clementine Berryhill, and the following uncles and aunts, to-wit; Martha E. Lee Kiefer. Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and
170 Josie Morton; that thereafter on or about the 8th day of October, A. D. 1902, the name of said Andrew J. Berryhill was duly placed on the tribal rolls of the Creek Nation as a citizen and member thereof, by the Commission to the Five Civilized Tribes and that afterwards on or about the 14th day of November, A. D. 1902, his enrollment was approved by the Secretary of the Interior; that afterwards in the year 1904 the lands in contro*b*ersy in this suit were set apart and allotted to the heirs of Andrew J. Berryhill, deceased, and that a patent therefor was afterwards issued; that afterwards on the 5th day of June, 1906, George Franklin Berryhill and Clementine Berryhill, father and mother of the said Andrew J. Berry-

hill, executed and delivered to the defendants, Edmond and Perry McKay, a warranty deed conveying the lands in controversy unto the said Edmond and Perry McKay and that afterwards on the 9th day of August, 1910, the said Edmond McKay and Perry McKay conveyed to the defendant, John V. McKay, an undivided one-third interest in said lands; that afterwards and subsequent to August 8th, 1907, the plaintiff D. A. McDougal, obtained conveyances in the form of warranty deeds from Martha E. Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and Josie Morton, the said uncles and aunts of Andrew J. Berryhill, deceased, purporting to convey the fee simple in said lands to the said D. A. McDougal subject to the life estate of the said George Franklin Berryhill, the father of the said Andrew J. Berryhill, deceased, and that said deeds were in the form as attached to said petition as exhibits. And the Court finds that the defendant Albert W. Shulthis, is in possession of said lands and that he is operating the same for oil and gas under a contract and agreement with the defendants, Edmond McKay, Perry McKay and John W. McKay.

171 And the Court finds that the said George Franklin Berryhill and Clementine Berryhill were the owners of said lands in fee simple as heirs of the said Andrew J. Berryhill, deceased, and that the said uncles and aunts of the said Andrew J. Berryhill were never the owners of any interest, right and title in said lands whatever and that their deeds to the plaintiff did not convey any right, title or interest *of* said plaintiff or vest in him any interest in said lands.

It is therefore considered, ordered, adjudged and decreed by the Court that the plaintiff, D. A. McDougal, take nothing by this action and that this petition be dismissed; and that the defendants have and recover of and from the said plaintiff, D. A. McDougal, all their costs in this behalf expended, to which judgment and order of the Court the plaintiff excepts.

And now on this 10th day of March, A. D. 1914, comes the plaintiff and files his motion for a new trial herein and the Court after hearing the motion and being well and sufficiently advised overrules said motion, to which action of the Court in overruling said motion, the plaintiff excepts.

And thereupon the plaintiff prays an appeal to the Supreme Court of the State of Oklahoma and it is ordered that the time for making and serving a case be and it is hereby extended for a period of forty days from this date, and it is further ordered that defendant be allowed ten days thereafter in which to suggest amendments and that the case made be settled and signed upon five days' notice by either party.

L. M. POE, *Judge.*

172 And thereupon, on the same day, towit, the 10th day of March, 1914, there was filed the motion of the plaintiff for a new trial, which motion is in the words and figures following, to-wit:

173 In the District Court in and for Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Motion for New Trial.

Comes now the above named plaintiff and moves the court to set aside, vacate and hold for naught the decision and judgment rendered in the above styled cause on the 10th day of March, 1914, for the following reasons and upon the following grounds, to-wit:

First. That there was an abuse of discretion on the part of the Court trying said cause by reason of its failure and refusal to allow your plaintiff to show that the cause in the Federal Court known as Shulthis vs. McDougal had not become a rule of property in the State of Oklahoma.

Second. That material error of law occurred at the trial of this cause and was duly excepted to by the party making this application, to-wit, your plaintiff.

Third. The judgment and decision of the Court is not sustained by sufficient evidence and the judgment and decision of the Court is contrary to law.

Wherefore, your plaintiff prays the Court that for the reasons and grounds above stated said judgment and decision be set aside, vacated and held for naught, and your plaintiff will ever pray.

L. O. LYTLE,
ROSSER & COCHRANE,
Attorneys for Plaintiff.

174 On the back of which Motion of the Plaintiff for a new trial appear the following endorsements: No. 3528. D. A. McDougal vs. Edmond McKay, et al. Motion for New Trial. District Court, State of Oklahoma, County of Tulsa. Filed Mar. 10, 1914. W. W. Stuckey, Clerk.

175 The above and foregoing is a full, true, correct and complete copy and transcript of all the pleadings, motions, orders, evidence, findings, proceedings, and judgments in said cause, including all the orders and rulings made, all of the exceptions allowed, all of the evidence offered or introduced, and all of the record upon which the judgment and journal entry in said cause were made.

176 In the District Court in and for Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Acceptance of Service.

We, the undersigned, attorneys of record for the defendants in the above entitled cause, do hereby certify that the foregoing case made was duly served on us on this 6th day of April, 1914.

GEO. S. RAMSEY,
C. L. THOMAS,
Attorneys for Defendants.

177 In the District Court in and for Tulsa County, Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Stipulation of Attorneys.

It is hereby stipulated and agreed by and between the parties hereto that the foregoing case made contains a full, true, correct and complete copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had, all of the evidence offered and introduced, all the orders and rulings made and exceptions allowed, and all of the record upon which the judgment and journal entry in said cause were made; and the same is a full, true, correct and complete case made; and the said defendants waive the right to suggest amendments to said case made and hereby consent that the same may be settled immediately and without notice, and hereby join in the request of the plaintiff that the Judge of said Court settle the same and order the same certified by the Clerk of the District Court and filed according to law; and said defendants hereby waive the issuance and service of summons in error from the Supreme Court of the State of Oklahoma.

MALCHON E. ROSSER,
WILLIAM S. COCHRAN,
Attorneys for Plaintiffs.
GEO. S. RAMSEY,
C. L. THOMAS,
Attorneys for Defendants.

Filed May 5th, 1914. W. H. L. Campbell, Clerk.

178 In the District Court of Tulsa County, Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Notice of Settlement of Case Made.

To the Attorneys for said Defendants:

You are hereby notified that on the — day of ——, 1914, at — o'clock — M., or as soon thereafter as counsel can be heard, the case made in said cause, with the amendments heretofore suggested by you, will be presented to the Honorable L. M. Poe at his chambers in the city of Tulsa for settlement.

—— ——,
—— ——,
Attorneys for Plaintiff.

Service of the above notice is hereby accepted this the 7th day of April, 1914.

GEO. S. RAMSEY,
C. L. THOMAS,
Attorneys for Defendants.

179 In the District Court in & for Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Certificate of Trial Judge.

This is to certify that the foregoing case made and the amendments thereto have been duly served in due time, and the amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same as above set forth, and as corrected by me, is true and correct, and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings, and judgments had in such cause; and I hereby settle, allow, certify and sign the same as true and correct, and hereby order that the Clerk of the District Court attest the same with the seal of said Court and file the same of record.

Witness my hand at Tulsa, Oklahoma, this 8th day of April 1914.
L. M. POE, *Judge.*

Attest:
W. W. STUCKEY,
Clerk of the District Court,
[SEAL.] By J. A. LASWELL, *Deputy.*

Endorsed: District Court, State of Oklahoma, County of Tulsa. Filed Apr. 8, 1914. W. W. Stuckey, Clerk.

180 Supreme Court, April Term, 1914, June 2nd, 1914, Fifteenth Judicial Day.

No. 6372.

D. A. McDOUGAL, Plaintiff in Error,
vs.
EDMOND McKAY et al., Defendants in Error.

And now on this day it is ordered by the court that the above cause be advanced and set for hearing at the July 1914 term of court as per motion filed herein on May 22, 1914.

181 Supreme Court, July Term, 1914, July 18th, 1914, Fifth Judicial Day.

No. 6372.

D. A. McDOUGAL, Plaintiff in Error,
vs.
JOHN V. McKAY et al., Defendants in Error.

And now on this day the above cause is submitted on the record and briefs filed herein.

182 Supreme Court, July Term, 1914, August 25th, 1914, Twelfth Judicial Day.

No. 6372.

D. A. McDOUGAL, Plaintiff in Error,
vs.
EDMOND McKAY et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed. Opinion by Riddle, J.

All the Justices concur.

183 (Filed Aug. 25, 1914. W. H. L. Campbell, Clerk.)

In the Supreme Court of the State of Oklahoma.

No. 6372.

D. A. McDOUGAL, Plaintiff in Error,
vs.
EDMOND McKAY, PERRY McKAY, JOHN V. McKAY, and ALBERT W. SHULTHIS, Defendants in Error.

Syllabus.

1. Andrew Berryhill was a mixed-blood member of the Creek tribe of Indians. He died while an infant, intestate, in November, 1901. Thereafter, his name was duly placed upon the rolls prepared by the Commission to the Five Civilized Tribes, and approved by the Secretary of the Interior. The land involved and other lands were selected by an administrator and set apart to him as an allotment. Patent was duly issued, conveying the land to his heirs. He left surviving his father, who was a mixed-blood member of the Creek tribe of Indians, and his mother, who was a non-citizen and not a member of any Indian tribe, together with several uncles and aunts, members of the Creek tribe. Held: That under Mansfield's Digest, chap. 49, sec. 2531, which was in force in the Indian Territory by virtue of an act of Congress, that the land involved was not a new acquisition, but came to him by the blood of his tribal parent, to-wit: his father, in whom the fee simple title to said land passed. (Following Shulthis v. McDougal, 170 Fed. 529; Pigeon et al. v. Buck et al., 38 Okl. 101.)
2. The plaintiff in error tendered certain testimony of lawyers, for the purpose of showing that the rule laid down by the Circuit Court of Appeals in the case of Shulthis v. McDougal, 170 Fed. 529, and the case of Pigeon et al. v. Buck et al., 38 Okl. 101, had not been followed generally by the profession and trial judges. Objection was made to the introduction of this testimony, upon the ground that it was incompetent and immaterial, which objection was by the court sustained. Held: That the court committed no prejudicial error in sustaining said objection. Held, further, that the rule announced in the case of Pigeon et al. v. Buck et al., supra, is adhered to and held to be a rule of property.

Error from the District Court of Tulsa County.

L. M. Poe, Trial Judge.

Affirmed.

Rosser & Cochran, Attorneys for Plaintiff in Error.
Ramsey & Thomas, Attorneys for Defendants in Error.

184 *Opinion of the Court by*

RIDDLE, *J.:*

The admitted facts in this case are, that Andrew J. Berryhill was a member by mixed-blood of the Creek Tribe of Indians; that he died intestate, while an infant, in the month of November, 1901, leaving surviving him his father, George Franklin Berryhill, and his mother, Clementine Berryhill; that George Franklin Berryhill was a member, by mixed-blood, of the Creek Tribe of Indians, and legally enrolled; that, his wife, mother of the deceased, Clementine Berryhill, was a non-citizen and not a member of any tribe of Indians; that Andrew J. Berryhill left no brothers or sisters surviving him; that on the 8th day of October, 1902, his name was duly and legally placed upon the tribal rolls of the Creek Nation as a member and citizen thereof by the Commission to the Five Civilized Tribes, and approved by the Secretary of the Interior; that in the year 1904, there was set apart and allotted in the name of the said Andrew J. Berryhill, deceased, the lands involved in this suit with other lands; that in October, 1905, patents were duly issued, conveying the title to said land to the heirs of the said Andrew J. Berryhill, deceased; that on the 5th day of June, 1909, George Franklin Berryhill and wife, Clementine Berryhill, father and mother of Andrew J. Berryhill, deceased, for a valuable consideration, executed and delivered to defendants, Edmond McKay and Perry McKay, a warranty deed, conveying all their title and interest in and to the lands involved herein; that thereafter, the said Edmond and Perry McKay conveyed their undivided one-third interest in said lands to John V. McKay; that Andrew J. Berryhill left surviving him the following uncles and aunts: Martha Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, Mary Kiefer and Josie Morton; that subsequent to August 8, 1907, the plaintiff, D. A. McDougal, received a conveyance from each and all of said uncles and aunts named herein, conveying to him whatever interest they each had, if any, in and to said land; that the defendant, Albert W. Shul-
185 this, is in possession of said land under a lease contract made by the defendants, McKays, conveying to him the oil and mineral; and that he is operating and taking the oil from said land under said lease contract.

The plaintiff filed this suit in the district court of Tulsa county to recover the lands in question, claiming to be the owner of the fee simple title, by virtue of his several conveyances received from the uncles and aunts of Andrew J. Berryhill, deceased, and for an accounting for the value of the oil and gas taken therefrom; for the appointment of a receiver and to have his title to the lands quieted, subject to the life estate alleged to be owned by the McKays.

The principal question raised in this appeal is as to whether the title to the lands involved is an ancestral estate, or a new acquisition. The plaintiff contends that under the laws of Arkansas, which were in force in the Indian Territory and made applicable to the Creek

Nation by virtue of an act of Congress, the lands involved were a new acquisition, and hence the father of Andrew J. Berryhill, deceased, took only a life estate. On the other hand, the defendants contend that under the decision by the United States Circuit Court of Appeals for the Eighth Circuit in the case of Shulthis v. McDougal, 170 Fed. 529, and upon the authority of the decision of this court in Pigeon v. Buck, 38 Okl. 101, the title to the lands of a Creek citizen who died intestate, unmarried and without issue, ascended in fee simple to the parent or parents who were of the tribal blood of the intestate, and that in the present instance the lands involved and which were a part of the allotment of Andrew J. Berryhill, deceased, passed to his father.

This court in the case of Pigeon et al. v. Buck et al., supra, following the rule laid down by the Circuit Court of Appeals, said:

"That the land in question was not a new acquisition, and pursuant to these sections, when construed together, passed to John Pigeon and Mate Pigeon, the father and mother of the deceased, is no longer an open question in this jurisdiction, having in effect been decided by the Circuit Court of Appeals for the Eighth Cir-
186 cuit in Shulthis v. McDougal, 170 Fed. 529, 95 C. C. A., 615. There Andrew J. Berryhill, son of George Franklin Berryhill, a member of the Creek Nation of mixed blood, and Clementine Berryhill, his wife, a non-citizen of that tribe, died seized of an allotment. In determining who took the estate, the court construed these two sections together and held the person to be George Franklin Berryhill, the father of the deceased."

And, in concluding the opinion, the court further said:

"We hold that John Pigeon and Mate Pigeon, his wife, are the persons to whom, on the death of the allottee, this estate passed in equal moieties, and that plaintiffs in error, plaintiffs below, have no interest therein."

It cannot be questioned that the decisions of the Federal court construing the acts of Congress relating to the allotment, alienation, etc., of lands belonging to the members of the Five Civilized Tribes are conclusive upon the state courts. The decision of the Circuit Court of Appeals in the case of Shulthis v. McDougal, supra, in the absence of an expression from the Supreme Court of the United States, should be followed by this court on all questions involving the construction of the Federal statutes and allotment acts relating to the members of the Five Civilized Tribes. The question raised here by this appeal was directly involved in the case of Schulthis v. McDougal, supra, and directly adjudicated by the Circuit Court of Appeals, and that decision has been adhered to by this court in the case of Pigeon et al. v. Buck et al., supra; and whatever may be our individual views as to the soundness of these decisions, we are not at liberty to disregard them, but feel constrained to follow the rule laid down therein.

It is further contended by plaintiff that the trial court erred in excluding certain testimony of lawyers tending to show that the rule laid down in the case of Shulthis v. McDougal, supra, was not followed, either by the legal profession or generally by the trial courts.

The purpose of tendering this evidence was to show that the rule announced by the Circuit Court of Appeals in the case of Shulthis v. McDougal, supra, had not become a rule of property in this state. Objection was made to the introduction of this evidence, upon the ground that it was incompetent and immaterial; which ob-
187 jection was by the court sustained. We are now called upon to hold that this ruling of the court was error. Generally, a question of this nature is one of law for the court, and not of fact; and the courts will usually take judicial knowledge as to whether or not a rule announced by the court is of such character, general standing and application as to become a rule of property. The decision in the case of Shulthis v. McDougal was rendered by the Circuit Court of Appeals in 1899 and became final and has been in force in this jurisdiction for several years; and about a year before the present case was tried, this court had followed the rule laid down by the Circuit Court of Appeals in the case referred to, and held that the rule announced had become a rule of property. Owing to the fact that the decision of the Circuit Court of Appeals, in the absence of a final decision by the Supreme Court of the United States, is controlling in this State, when applied to the allotment and alienation of lands of the Five Civilized Tribes, and the further fact that this court in an opinion which has been in force over a year has followed the rule laid down by the Circuit Court of Appeals, and has held the same to be a rule of property, we are of the opinion that the court committed no error in excluding this evidence.

Discussing this question, Vol. 11, p. 755, Cyc. states the rule to be:

"Where judicial decisions may fairly be presumed to have entered into the business transactions of a country and have been acted upon as a rule of contracts and property, it is the duty of the court, on the principle of stare decisis to adhere to such decisions without regard to how it might be inclined to decide if the question were new. And this rule obtains, although the court may be of the belief that such decisions are founded upon an erroneous principle and are not sound, for when parties have acted upon such decisions as settled law and rights have been vested thereunder, their inherent correctness or incorrectness in the abstract are of less importance than that the rule of property so established should be constant and invariable."

Mr. Justice Greer, speaking for the Supreme Court of the United States, in the case of Minnesota Company v. National Company, 3 Wall, 332, stated:

188 "Where questions arise which affect titles to land, it is of great importance to the public that when they are once decided, they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubt-

ful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of the law when the *administrators* of it is changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well-considered and solemn judgments."

The basis upon which the rule rests is not so much the actual condition existing as a matter of fact, but when a decision of the highest court in any jurisdiction has settled a question of this nature which may affect titles to property, it is conclusively presumed that parties have relied upon such decision as-being the law when purchasing and selling property. While we are aware of the fact that a large per cent of the lawyers in the eastern side of this State were of the opinion that the titles to land similar to the title in question were a new acquisition, yet it may be conceded that the statute was subject to the construction placed thereon by the Circuit Court of Appeals, and that no great principle of law was disregarded in establishing the rule laid down by that court. While prior to the decision of this court in Pigeon et al. v. Buck et al., supra, following the rule laid down by the Circuit Court of Appeals, the lawyers and the courts generally may not have followed the decision of the Circuit Court of Appeals implicitly, yet if only a very small per cent of the people investing money in lands of this character did so upon the strength of the rule announced by that court and as followed by this court, their titles should not be disturbed by a decision at this time holding that the land in question was a new acquisition. Such decision might disturb vested rights and bring into question many titles, which should be avoided, if possible.

We are therefore of the opinion that the court did not err
189 in rejecting the evidence offered, and we still adhere to the rule laid down by this court in the case of Pigeon et al. v. Buck et al., supra, following the decision of the Circuit Court of Appeals, and we reiterate that the same has become a rule of property in this jurisdiction.

Finding no prejudicial error in the proceedings and judgment of the trial court, the same is affirmed.

All the Justices concur.

190 Supreme Court of the State of Oklahoma.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 189 pages numbered from one to 189, inclusive, are a true and complete transcript of the record and all proceedings in said Supreme Court in the case of Daniel A. McDougal, Plaintiff in Error, vs. Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, Defendants in Error, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the

seal of said Supreme Court, at Oklahoma City, Okla., this 20th day of October, A. D. 1914.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of Oklahoma,
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 24,420. Oklahoma Supreme Court. Term No. 676. Daniel A. McDougal, plaintiff in error, vs. Edmond McKay, Perry McKay, John V. McKay, and Albert W. Shulthis. Filed October 30th, 1914. File No. 24,420.

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. . . . .

DANIEL A. McDOUGAL, - - *Plaintiff in Error,*

vs.

EDMOND McKAY, JOHN V. McKAY, PERRY McKAY and ALBERT W. SHULTHIS,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

MOTION TO ADVANCE CASE.

Comes now Daniel A. McDougal, plaintiff in error in the above styled case, and moves the court to advance said case and to set the same for hearing at the same time as the case of *Lena Pigeon, et al., against William Buck et al.*, running No. 23754 and No. 199 of the Docket of the October, 1914, term of this court. And as grounds of said

motion states that the sole question presented in said case of *Pigeon et al. against Buck et al.,* is whether the allotment of lands of a citizen of the Creek Nation is an ancestral estate or a new acquisition within the meaning of Section 2531 of Mansfield's Digest of the Statutes of Arkansas, which was in force in the Indian Territory at the time the descent was cast as to the land involved in said action, construed in connection with Section 2522 of said Mansfield's Digest of said Statutes of Arkansas, and especially in connection with subsection 2 of said section 2522. That said section 2531 is as follows:

> "In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided."

That said section 2522 of Mansfield's Digest is as follows:

> "When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be dis-

tributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

First. To children or their descendants, in equal parts.

Second. If there be no children, then to the father, then to the mother, if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third. If there be no children, nor their descendants, then to the grandfather, grandmother, uncles and aunts, and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestors, and their children and their descendants, in equal parts."

That it was decided by the Supreme Court of the State of Oklahoma in said case of *Pigeon* v. *Buck* (38 Okla. 101, 131 Pac. 1083), that the allotment of a Creek citizen was an ancestral estate and not a new acquisition, and that upon the death of an allottee of the Creek Nation without issue the parent or parents of said allottee of Creek blood, inherited the fee to said allotment to the exclusion of the brothers and sisters of said allottee. That it was also decided in said case that the decision by the Circuit Court of Appeals of the Eighth Circuit in the case of *Shulthis* v. *McDougal,* reported in 170 Fed. 599; 95 C. C. A. 615, in which the same question had been decided in the same way had become a rule of property.

That this case of *McDougal against McKay* involves the same question as was involved in *Pigeon* v. *Buck*. That the principal question involved in this case is whether the allotment of a Creek Indian is a new acquisition or an ancestral estate within the meaning of Sections 2531 and 2522 of Mansfield's Digest of the Statutes of Arkansas quoted above. That it is contended by the appellant herein, Daniel A. McDougal, just as is contended by the appellant in *Pigeon* v. *Buck*, that the estate of an allottee of lands in the Creek Nation is a new acquisition and not an ancestral estate. That in this case also the appellant undertook to prove and offered what he considered material and competent evidence to show that the case of *Shulthis* v. *McDougal had never become a rule of property* in the State of Oklahoma, and that most allotments concerning which this question could arise had been sold and bought on the supposition and theory that they were new acquisitions in the allottee and not ancestral estates; that a very large majority of transfers of allotments concerning which this question could arise were made in the belief by the grantor and grantee that the estates of allottees were new acquisitions and not ancestral estates, and that the Supreme Court of the State of Oklahoma erred in holding that the rule announced in *Shulthis* v. *McDougal* had become a rule of property. That the evidence so offered was excluded by the courts of the state, but that it is in the record in this case, and as this

appellant believes should be read by this court before passing on any of the cases now before this court in which this question is involved. That the evidence is, as this appellant believes, admissible, and is conclusive that the rule announced in *Shulthis* v. *McDougal*, 170 Fed. 529; 95 C. C. A. 615, never became a rule of property in the Indian Territory of Oklahoma.

The appellant believes he will be able to convince the court that the decision in *Shulthis* v. *McDougal* never became a rule of property in Oklahoma and believes that he should have the opportunity to present this matter before the court decides any case involving the question as to whether allotments are ancestral estates or new acquisitions.

Wherefore, ~~Appellant~~ Plaintiff in error prays that this case be advanced and set for hearing on the same day as the case of *Pigeon* v. *Buck*.

MALCOLM E. ROSSER,

Attorney for ~~*Appellant*~~ *Plaintiff in Error, Daniel A. McDougal.*

Service accepted and as counsel for defendants in error, we consent to advance.

Geo. S. Ramsey
Edgar A. de Meules
Attys.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 676.

DANIEL A. McDOUGAL, - - - *Plaintiff in Error,*

vs.

EDMOND McKAY, et al., - - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF.

This case is brought here by writ of error from the Supreme Court of the State of Oklahoma. It had the same title in that court. The subject matter involved is the ownership of certain lands in the Creek Nation which constituted part of the allotment of Andrew J. Berryhill, described as follows, to-wit:

> The East Half (E/2) of the North-west Quarter (NW/4) of the North-east Quarter (NE/4) and the South-west (SW/4) of the North-west Quarter (NW/4) of the North-east (NE/4) quarter of Section Thirteen (13) Township Seventeen (17) North, Range Twelve (12) East, containing Thirty (30) acres, more or less, according to the United States survey thereof.

STATEMENT.

The facts are that in the month of May, A. D. 1901, a child named Andrew J. Berryhill was born to George Franklin Berryhill and Clementine Berryhill, husband and wife. George Franklin Berryhill was a member of the Creek tribe of Indians by blood and a duly enrolled citizen, and his name appears upon the roll as a mixed blood, not a full-blood. The mother of the said Andrew J. Berryhill, Clementine Berryhill, was not of Creek blood and was not, and is not, a citizen of the Creek Nation. Andrew J. Berryhill died in the month of November, 1901, intestate and unmarried, leaving no brothers or sisters surviving him. Afterwards, on the 8th day of October, A. D. 1902, his name was placed upon the tribal rolls of the Creek Nation as a citizen thereof, by the Commission to the Five Civilized Tribes, and his enrollment as such citizen was approved by the Secretary of the Interior on November 13, 1902. Afterwards, on the 28th day of April, A. D. 1904, the Commission to the Five Civilized Tribes set apart and allotted to him the land in controversy in this action, and, on, or about the 10th day of October, 1905, the Creek Nation and the United States of America, through their legal representatives, executed a patent to said lands conveying the title in and to said lands to the heirs of Andrew J. Berryhill, deceased.

On the 5th day of June, 1906, the said George Franklin Berryhill and Clementine Berryhill, father and mother of the said Andrew J. Berryhill, deceased, executed and delivered to the defendants in error, Edmond McKay and Perry McKay, a warranty deed by which they granted and conveyed to the defendants in error, Edmond McKay and Perry McKay, all their right, title and interest in and to the lands in controversy. Afterwards, on the 9th day of August, A. D. 1910, the said Edmond McKay and Perry McKay, joined by their wives, executed and delivered to the defendant in error, John V. McKay, a deed to an undivided one-third interest in the lands in controversy in this action. Andrew J. Berryhill left surviving him the following uncles and aunts, to-wit: Martha E. Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and Josie Morton. Afterwards, and subsequent to August 8th, 1907, the plaintiff in error, Daniel A. McDougal, purchased from each and all of said uncles and aunts their right, title and interest in and to the lands in controversy in this action, and each and all of said uncles and aunts executed and delivered to Daniel A. McDougal warranty deeds for said lands conveying and vesting in the said Daniel A. McDougal the fee in and to said lands, subject to a life estate in the father, George Franklin Berryhill. The deed from Martha E. Lee Kiefer is dated August 20th, 1907. The deed from Stanford Berryhill is dated

August 16th, 1907. The deed from Columbus Berryhill is dated August 1st, 1907. The deed from Theodore Berryhill is dated August 15th, 1907. The deed from William Berryhill is dated August 16th, 1907. The deed from Mary Kiefer is dated August 16th, 1907. The deed from Josie Morton is dated August 20th, 1907. Copies of these deeds appear in the record. As no objection was made to their sufficiency in form or to the manner of their execution, it is not considered necessary to refer to them in greater detail in this statement. The defendant in error, Albert W. Shulthis, is the holder of a purported oil lease from the McKays. The validity of the lease depends upon the title of the McKays. If they own the fee simple, he has a good title; otherwise, not.

The facts as stated here were alleged in detail in the petition of the plaintiff in error and were admitted by the answers of the defendants in error. The petition also set forth in detail the various statutes and treaties under which plaintiff in error claims title. At the time this suit was brought in the District Court of Tulsa County, Oklahoma, there was a suit pending in the United States District Court for the Eastern District of Oklahoma, brought by John V. McKay, as a non-resident of the State of Oklahoma, against the plaintiff in error, Daniel A. McDougal, to quiet the title of the said John V. McKay to an undivided one-third interest in the lands in controversy, and the said John V. McKay, for his

parate answer in this case adopted the answer of e other defendants and also set forth the pendency his action in the Federal Court.

The principal matter submitted to the trial rt, as well as the Supreme Court of the State of lahoma, was whether George Franklin Berryhill, herited the fee simple through his son, Andrew J. rryhill, or whether he only inherited a life es-e.

At the trial of the case in the District Court of lsa County, the plaintiff in error, offered to prove the evidence of a number of witnesses, who were acticing lawyers of the State of Oklahoma, in good nding, that the decision of the Circuit Court of peals in the case of *Shulthis* v. *McDougal,* 170 d. 529, had not been considered by the bar of the ate of Oklahoma as settling the question involved ere, and had not established a rule of property th reference to that question in the State of Okla-ma. All of this evidence was excluded and its ex-usion was excepted to by the plaintiff in error. here was a judgment for the defendants in error d the plaintiff in error appealed to the Supreme urt of the State of Oklahoma where the judgment the trial court was affirmed and the writ of error this case was sued out to this court.

The judgment rendered in the trial court was on the pleadings. The defendants admitted all e material allegations of plaintiff's petition. No idence was considered. Certain evidence was of-

fered that will be referred to later but the principal facts were admitted by the answer.

The principal question in the case involves the construction of the statute of descents and distributions of the statutes of Arkansas as contained in Chapter 49 of Mansfield's Digest of the Statutes of Arkansas put in force in the Indian Territory. It was contended by the plaintiff in error, Daniel A. McDougal, that under the provisions of that chapter and especially under the provisions of Section 2531 of said Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, George Franklin Berryhill, the father of Andrew J. Berryhill, only inherited a life estate from his deceased son, and that he did not inherit the fee simple title, and that the uncles and aunts, grantors of the plaintiff in error, inherited the fee simple in the land, subject to the life estate in George Franklin Berryhill, the father of the deceased allottee, Andrew J. Berryhill.

ASSIGNMENT of ERRORS.

Plaintiff in error filed the following as his assignment of errors:

1. The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Tulsa County.

2. The Supreme Court of the State of Oklahoma erred in holding and deciding that under Mansfield's Digest of the Laws of Arkansas, and particularly Chapter forty-nine thereof, the allotment of Andrew J. Berryhill was an ancestral estate and not a new acquisition.

3. The Supreme Court of the State of Oklahoma erred in holding and deciding that the father of Andrew J. Berryhill, deceased, inherited the fee simple in the lands of said Andrew J. Berryhill, deceased, upon his death, to the exclusion of the collateral kindred of said Andrew J. Berryhill.

4. The Supreme Court of the State of Oklahoma erred in holding and deciding that the various grantors of the plaintiff in error who were the uncles and aunts of the said Andrew J. Berryhill, deceased, did not inherit the fee simple estate in his allotment upon his death, and that plaintiff in error acquired no interest in said lands under and by virtue of his deeds from them.

5. The Supreme Court of the State of Oklahoma erred in holding and deciding that the testimony of lawyers to the effect that the decision of the Circuit Court of Appeals in the case of *Shulthis* v. *McDougal,* 170 Fed. 529, had not been followed or acquiesced in by the bar of the state or by the *nisi prius* judges, was not admissible in evidence.

6. The Supreme Court of the State of Oklahoma erred in holding and deciding that the decision in the case of *Shulthis* v. *McDougal,* 170 Fed. 529; and *Pigeon* v. *Buck,* 38 Okla. 101, had become a rule of property.

SPECIFICATION *of* ERRORS.

The plaintiff in error believes that the Supreme Court of the State of Oklahoma erred:

1. In holding that the allotment of Andrew J. Berryhill, deceased, was an ancestral estate and not a new acquisition.

2. In holding that the father of Andrew J. Berryhill, deceased, inherited the fee simple in the lands of said Andrew J. Berryhill, to the exclusion of the collateral kindred of the said Andrew J. Berryhill.

3. In holding that the uncles and aunts of the said Andrew J. Berryhill did not inherit the fee simple estate in his allotment.

4. In holding that the testimony offered to the effect that the decision of the Circuit Court of Appeals in the case of *Shulthis* v. *McDougal,* 170 Fed. 529, had not been followed or acquiesced in by the bar of the state, nor by the *nisi prius* judges, was not admissible.

5. In holding that the decisions in the case of *Shulthis* v. *McDougal,* 170 Fed. 529, and *Pigeon* v. *Buck,* 38 Okla. 101, had become a rule of property.

ARGUMENT.

Specifications One, Two and Three.

The first three specifications all depend upon whether the allotment was a new acquisition or an ancestral estate and will be presented together under the following heads:

1. The Arkansas Statutes and the construction thereof in Arkansas and Indian Territory.
2. The land was a new acquisition in Andrew J. Berryhill and not an ancestral estate.
3. Citizenship in the Creek Nation was not a property right.
4. The lands of the Creek Nation prior to allotment belonged to the Creek Nation as a political body and not to the individual members of the tribe.

The Arkansas Statutes and the Construction Thereof in Arkansas and Indian Territory.

If the allotment of Andrew J. Berryhill was a new acquisition in him, then it follows that the uncles and aunts, who were the collateral kindred, inherited the fee simple in the lands and the father only inherited a life estate. It is the contention of the plaintiff in error that under the undisputed facts in this case the uncles and aunts of the deceased Andrew J. Berryhill became the owners in fee sim-

ple in the land subject to the life estate in the father. This contention is based on the construction of Section 2531 of Mansfield's Digest of the Statutes of Arkansas, which is contained in Chapter forty-nine of Mansfield's Digest. So much of Chapter forty-nine of Mansfield's Digest as is material to the decision of this case is as follows:

(1). *Section 2522.* "When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

First. To children or their descendants, in equal parts.

Second. If there be no children or their descendants, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third. If there be no children, nor their descendants, father, mother, brother or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts, and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts."

(10) *Section 2531.* "In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother the estate, or so much thereof as came by the

mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend in remainder, to the collateral kindred of the intestate in the manner provided in this act; and in default of a father, then to the mother for her lifetime; then to descend to the collateral heirs as before provided."

(11). *Section 2532.* "The estate of an intestate, in default of a father and mother, shall go. first, to the brothers and sisters, and their descendants, of the father; next, to the brothers and sisters, and their descendants, of the mother. This provision applies only where there are no kindred, either lineal or collateral, who stand in a nearer relation."

(12). *Section 2533.* "Relations of the half-blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance comes to the intestate by descent, devise or gift, of some one of his ancestors, in which case all those who are not of the blood of such ancestor, shall be excluded from such inheritance."

(13). *Section 2534.* "In all cases not provided for by this act, the inheritance shall descend according to the course of the common law."

(14). *Section 2535.* "Whenever an inheritance, or a share of an inheritance, shall descend to several persons, under the provisions of this act, they shall inherit as tenants in common, in proportion to their respective shares or rights."

CONSTRUCTION.

(19). *Section 2540.* "The term 'real estate' as used in this act, shall be construed to include every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of the intestate, seized or possessed thereof in any manner other than by lease for years and estate for life of another person."

(20). *Section 2541.* "The term 'inheritance' as used in this act, shall be understood to mean real estate, as herein defined, descended according to the provisions of this act."

(21). *Section 2542.* "Whenever, in any part of this act, any person is described as living, it shall be understood that he was living at the time of the death of the intestate from whom the descent came; and, when any person is described as having died, it shall be understood that he died before the intestate."

(22). *Section 2543.* "The expression used in this act, 'where the estate shall have come to the intestate on the part of the father,' or 'mother,' as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise or descent from the parent referred to or from any relative of the blood of such parent." (Rev. Stat., Chap. 49).

[The numbers in parenthesis at the beginning of each paragraph above are the original numbers of the sections. The numbers following the word "Section" are the numbers given in Mansfield's Digest.]

It is the contention of the plaintiff in error that the allotment of Andrew J. Berryhill was a new acquisition in him and that it was not an ancestral estate. When the Statutes of Arkansas were adopted in the Indian Territory, they were adopted with the same construction that had been placed on them by the decisions of the Supreme Court of Arkansas, rendered prior to the adoption of the statutes. This has been decided often with reference to the Statutes of Arkansas extended over the Indian Territory and is a familiar rule of construction. In the case of *Robinson & Company* v. *Belt*, 107 U. S. 41, 47 L. ed. 65, discussing the construction to be given a certain Arkansas Statute put in force in the Indian Territory, this Court said (p. 47, L. ed. p. 68):

> "While the case under consideration arose in the Indian Territory, the law applicable thereto is determined by the laws of Arkansas, which were adopted and extended over the Indian Territory by the act of Congress approved May 2, 1890 (26 Stat. at L. 94, s. 31), which declares that certain general laws of Arkansas, 'which are not locally inapplicable, or in conflict with this act, or with any law of Congress relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory,' among which laws are enumerated assignments for the benefit of creditors and the statute of frauds. *In adopting this law with respect to assignments, the courts of the Indian Territory are also bound to respect the decisions of the Supreme Court of Arkansas interpreting that law.*

"In more than one case we have had occasion to hold that, if a foreign statute be adopted in this country, the decisions of foreign courts in the construction of such statute should be considered as incorporated into it. Thus, in *Pennock* v. *Dialogue*, 2 Pet. 1; 7 L. ed. 327, it was said by Mr. Justice STORY (p. 18, L. ed. p. 333): 'It is doubtless true, as has been suggested at the bar, that where English statutes, such, for instance, as the statute of frauds and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority.' In speaking of our patent act, which was largely taken from the English statute of monopolies, he says (p. 20, L. ed. p. 334): 'The words of our statute are not identical with those of the statute of James, but it can scarcely admit of doubt that they must have been within the contemplation of those by whom it was framed, as well as the construction which had been put upon them by Lord Coke.' In *Cathcart* v. *Robinson*, 5 Pet. 264, 8 L. ed. 120, Mr. Chief Justice MARSHALL said (p. 280 L. ed. 126): 'By adopting them (British Statutes), they become our own as entirely as if they had been enacted by the legislature of the state. The received construction in England at the time they are admitted to operate in this country, indeed, to the time of our separation from the British Empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But, however, we may respect subsequent decisions—and certainly they are entitled to great respect—we do not admit their

absolutely authority.' See also *Kirkpatrick* v. *Gibson*, 2 Brock. 388, Fed. Cas. No. 7848. The same rule has been applied in the state courts in the construction of statutes adopted from other states. *Com.* v. *Hartnett*, 3 Gray 450; *Tuler* v. *Tyler*, 19 Ill. 151; *Bloodgood* v. *Grasey*, 31 Ala. 575; *Marqueze* v. *Caldwell*, 48 Miss. 23; *State* v *Robey*, 8 Nev. 312; *The Devonshire*, 8 Sawy. 209, 13 Fed. 39."

The court then goes on to cite Arkansas cases and to follow their construction. To the same effect see the following decisions of the courts having jurisdiction over the Indian Territory prior to its incorporation in the State of Oklahoma:

Sanger v. *Flow*, 48 Fed. Rep. 152;
Blaylock v. *Incorporated Town of Muskogee*, 117 Fed. 125;
McFadden v. *Blocker*, 2 Ind. Ter. 260; 48 S. W. 1043; 58 L. R. A. 878;
Blaylock v. *Incorporated Town of Muskogee*, 4 Ind. Ter. 43; 64 S. W. Rep. 609;
Boyd v. *Mitchell*, 4 Ind. Ter. 47; 64 S. W. Rep. 610.
Zufall v. *United States*, 1 Ind. Ter. 638; 43 S. W. 760;
Randolph v. *United States*, 1 Ind. Ter. 705, 43 S. W. 1098;
Carter v. *Barton*, 2 Ind. Ter. 99; 48 S. W. 1017;
LeBosquet v. *Myers*, 103 S. W. 770 (I. T.);
J. B. Bostic Co. v. *Eggleston*, 104 S. W. 566, (Ind. Ter.);
Western Investment Co. v. *Davis*, 104 S. W. 573 (Ind. Ter.)

Assuming that this contention is correct and that this court will give this statute the construction which had been given to it prior to its adoption in the Indian Territory, we will look to the decisions of the Supreme Court of the State of Arkansas to ascertain what that construction was. The leading case in the State of Arkansas construing the provisions of Chapter 49 of Mansfield's Digest is the case of *Kelly's Heirs* v. *McGuire's Heirs*, 15 Ark. 555. This case took up the chapter and discussed all of its provisions and painstakingly construed the various provisions of the chapter. This decision, almost a statute of itself, has remained from the time of its rendition to the present as a guide and rule to the bench and bar of the State of Arkansas. The construction given there has never been departed from in the State of Arkansas and that case was always looked to as the final and binding authority by the courts and bar of the Indian Territory, prior to the decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal*, 170 Fed. 529. The court in *Kelly* v. *McGuire* said, (page 584):

> "The first section is general and comprehensive, embracing all lands, whether ancestral or newly acquired, *subject to certain exceptions and qualifications*, hereafter more particularly noticed and these exceptions refer to *real estate alone*. This section also constitutes the table by which real estate is to descend and personal property to be distributed. As, by its express language, it relates to both real and personal property, it was manifestly the design of the

legislature, when there were *descendants* of the intestate, to send down both to them *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, without any regard to the fact as to *how the property had been acquired.*"

The court further said (page 585):

"The 1st, 4th, 5th, 15th, 16th, 17th and 18th sections, are the only ones designated, in our opinion, to apply to both real and personal estate. All the rest embrace real estate alone.

"The effect of the 1st section is, to constitute the persons, who take the personal property, whether *per capita* or *per stirpes*, and whether the whole or half-blood, the absolute owners. Nor is it material, whether those persons are of the paternal or maternal, or the lineal or collateral line. By that section, as already remarked, real and personal estate goes in the same channel, and if no subsequent provisions had been introduced, touching real estate, the precise bearing of which, it is probable the rivers (revisers) did not perceive, our labors would have been comparatively easy. At present nothing further need be said as to personal property, as we shall find it necessary to allude to that hereafter, and shall now speak in reference to real estate.

"The effect of the 1st section, subject to the exceptions and qualifications alluded to, is to vest an absolute estate of inheritance in lands in the person who takes. And every estate, interest and right, legal and equitable, in lands and tenements and hereditaments, excepting only leases for years, and estates for the life of another person, are thus inheritable and descendable; or, as the first section expresses it,

'having title to any real estate of inheritance,' constitutes an inheritable estate, thus abolishing the common law doctrine, derived from the feudal times, of actual seizin in the ancestor. Whoever claimed by descent, was bound to show that he was heir to the first purchaser; and the seizin of the last possessor, from whom he claimed as heir, was considered as presumptive evidence of his being of the blood of the first purchaser. It supplied the difficulty of investigating a descent from a distant stock, through a line of succession become dim by the lapse of ages. 4 Kent. 386.

"But with us, ownership, or title to property, is substituted for seizin; and that maxim *seisina facit stipitem,* of such controlling consequence in the English scheme of descents, is entirely superseded. By descent or hereditary succession, it is understood the title whereby a person, upon the death of his ancestor, acquires the estate of the latter as his heir at law. 3 Bac. Abr. Descent 104.

"We pass now to the more particular consideration of the 10th section.

"The manifest intention of the first part of this section, was to preserve ancestral estates in the line of the blood from whence they came. It was a partial adoption or recognition of the common law principle, which invariably followed the line of the blood. If the estate comes to the intestate by the father, or as it may be differently, and as well expressed, on the part of the father, then it must ascend to the father and his heirs, and thus overturning the inflexible rule of the common law, that an estate could never ascend; but should rather escheat to the lord. And so, if it comes by or on the part of

the mother, it goes to the mother and her heirs, in the exclusion of the heirs of the father. In other words, it remains in the paternal or maternal line, from whence it was derived.

"The expressions, 'come by the father,' or 'mother' or on 'the part of the father' or 'mother' mean the same thing. *Maffit* v. *Clark*, 6 Watts & Serg. 260. They are familiar to, and derived from the common law, having an appropriate, technical meaning, which we must suppose the Legislature intended to adopt. They embrace not only the father, but all of the ancestors of the father, both paternal and maternal. Co. Litt. 12 a. Whenever, says Lord Coke, lands do descend from the part of the mother the heirs of the part of the father shall never inherit. And likewise, when lands descend from the part of the father, the heirs of the part of the mother shall never inherit. Co. Litt. 13 a.

"The 10th and 22nd sections must be construed together, although the exact expressions used in the latter, are not contained in any part of the statute. But words of equivalent signification, are employed, and they are embraced within the spirit of the 22nd section. Any other exposition would render the section entirely nugatory; and we must so construe statutes as that every part may have its proper effect, if possible.

"The expression, then, 'come by the father or mother' is not limited to an estate acquired by descent merely, but includes an estate which comes to the intestate by gift, devise or descent from the parent referred to, or from any relation of the blood, of such parent. Such is the letter and spirit of the statute. In other words, there are two classes provided for: one, where

the blood of the person, from whom the estate came, whether it be by descent, devise or gift, is regarded; and the other, where the blood of the intestate forms the *stirpes,* or stock of descent, without respect to ancestral blood.

"Chancellor Kent says there is a difference in the laws of the several states, between the succession to estates, which the intestate had acquired in the course of descent, or by purchase. 'If the inheritance,' says he, 'was ancestral, and came to the intestate by gift, devise or descent, it passes to the *kindred* who are of the *blood of the ancestor from whom it came,* whether in the paternal or maternal line.' 4 Kent 404.

"The portion of the 10th section, as to *new acquisitions,* gives the father and mother a life estate only, with remainder to the collateral heirs of the intestate: such as brothers and sisters, and their descendants, and so on. A new acquisition, or newly acquired estate, does not afford itself, an exact idea of the mode of acquisition. By common law, there were two modes of acquiring an estate—distinguished by the general appellations of descent and purchase. In the first, it was by operation of law; and in the second, by act or agreement of parties. Devises and gifts fall in the latter class. An estate by purchase there became inheritable to the heirs general of the purchaser, first of the paternal and then of the maternal line. 2 Bl. Com. 243.

"It must be understood, however, that a new acquisition in the sense intended by the statute, is one which the intestate has acquired by his exertions and industry, *(Brewster* v. *Benedict* 14 Ohio 385*)*, or by will or deed from a stranger. In other words, it is an estate derived

from any source other than descent, devise or gift, from father or mother, or any relative in the paternal or maternal line. *Butler* v. *King*, 2 Yerg. 116.

"If the son should purchase land from the father or mother, for a valuable consideration, it would be a new acquisition and descend as such; because nothing is received by way of bounty at the hands of ancestors, which is the case as to lands descended from, or devised, or given by them to the intestate, and it was thought reasonable that they should remain in the blood from which they came.

"Land is to be considered as having come from, or by, or on the part of, the father or mother, when it comes by gift, devise or descent, either mediately or immediately from them, or from any person in their respective lines. *Shippen* v. *Izard*, 1 Serg. & Rawle. 223."

Further in the opinion the Court epitomizes as follows (p. 590):

"After carefully considering each of the provisions of the statute, and altogether as a whole, we have come to the following conclusions:

"*1st.* That, as to both real and personal property, it was the design of the Legislature, when there were *descendants* of the intestate, to send down both to them, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, without any regard to the fact as to how the estate was acquired.

"*2nd.* That, as to personal property, it was the design, where there were no descendants, that it should go to collaterals in the same way

it would have gone to descendants, if there had been any; that is to say, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, and without inquiry as to how the property was acquired by the intestate.

"*3rd.* That, as to real estate, it was the design of the Legislature, where there were no descendants, to point out the lines of the succession, and that this is to depend on the fact, whether the inheritance is ancestral or new; and, if ancestral, then whether it come from the paternal or maternal line.

"*4th.* If the inheritance was ancestral, and come from the father's side, then it will go to the line on the part of the father, from whence it came, not in postponement, but in exclusion of the mother's line; and so on the other hand, if it come from the mother's side, then to the line on the part of the mother, from whence it came, to the exclusion of the father's line.

"*5th.* If the inheritance be not ancestral, but a new acquisition, then, after a life estate, reserved in succession to the father and mother, if alive, it will go in remainder, first to the line of the intestate's paternal uncle and aunts, and their descendants, in postponement of the mother's line, until the former becomes extinct; and then to the line of the intestate's maternal uncle and aunts, and their descendants; unless there should be kindred, lineal or collateral, who, either in right of propinquity, or by right of representation, stand in a nearer relation to the intestate than the uncles and aunts; in which case, such nearer kindred would take the inheritance to the exclusion of both of these collateral lines; and, in their hands, it would become an

ancestral estate, and always go in the blood of the relative from whence it came, in the ordinary course of descent prescribed for ancestral inheritances. Digest, secs. 10 and 11, p. 437."

"*6th.* That, when the inheritance is fixed by these facts in any given line, it will pursue that line until it becomes extinct, and the objects of bounty, and the order in which they succeed one another, and the proportion they take, are to be ascertained by the 1st section, which is to be considered as the general table of descent. The father, mother, brothers, sisters and so on, mentioned in that section, are those who are to be considered when counting from any propositus whether the propositus of a single line only, or the concurring propositus of both lines, as the intestate is, as to personal property."

Besides the case of *Kelly* v. *McGuire,* 15 Ark. 555, this statute has been construed by the Supreme Court of Arkansas in two other cases and applied to a state of facts believed to be analogous to the facts of the present case.

In the case of *Hogan* v. *Finley,* 52 Ark. 55; 11 S. W. 1035, it was decided that where a father, desiring to procure the title to certain lands belonging to the state and to give them to his son, procured a donation deed from the state to his minor son and paid the fees and expenses necessary to obtaining the deed, the title so obtained was a *new acquisition* in the son, that the father took only a life estate in the lands and that he had no interest in the lands he could devise.

To the same effect is the case of *Magness* v. *Arnold*, 31 Ark. 103. These cases, as well as the case of *Kelly's Heirs* in 15 Ark. 555, had been the settled construction of the statute in Arkansas for years before the statute was adopted in the Indian Territory, and still is. (*Wheelock* v. *Simons*, 75 Ark. 19; 86 S. W. 830.) In putting the statute in force in the Indian Territory, Congress undoubtedly intended to extend with it the construction that had been placed upon it by the Supreme Court of Arkansas.

The Land Was a New Acquisition in Andrew J. Berryhill and Not an Ancestral Estate.

In ascertaining whether the land in controversy was a new acquisition in Andrew J. Berryhill or an ancestral estate, it becomes necessary to examine the statutes in force at the time the land was allotted and under which it was allotted. The original intention of Congress appears to have been to give the allotments to the living members of the tribe (Sec. 11, Act of June 28, 1898, entitled, "An Act for the protection of the people of the Indian Territory and for other purposes," 30 Stat. 495): but later recognizing that there must be a time fixed upon which all persons living at that time were entitled to allotment, it was provided by Section 28 of the Original Creek Agreement, approved March 1, 1901 (31 Stat. 861) and ratified by the Creeks May 25, 1901, that:

> "All citizens who were living on the first day of April, eighteen hundred and ninety-nine,

entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eight, eighteen hundred and ninety-eight, entitled, 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

Section seven of the Supplemental Creek Agreement (32 Stat. 500) provides:

"All children born to those citizens who are entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

Section five of the Act of April 26, 1906 (34 Stat. 137) provides:

"That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deeds had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same; Provided, the provisions of this section shall not affect any rights involved in the contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act."

It seems clear that under these provisions the lands and moneys were to descend in the same way and go to the same persons as would have taken them, had the children coming within the purview of these sections lived until their allotments were selected and then died seized thereof. (See *Sizemore* v. *Brady*, decided by this Court December 21, 1914.) An argument has been made to the effect that because a dead person cannot take title to land, and

because the land was allotted direct to the heirs instead of the deceased member of the tribe, in whose right it was taken, it was not an inheritance in the heirs but a direct allotment in them; but conceding (and it must be conceded) that the title never vested in the allottee but did vest direct in the heirs, yet it vested in the same heirs who would have inherited had the deceased person selected an allotment prior to his death and died seized thereof leaving the same persons related to him in the same way. (*Reynolds* v. *Fewel*, decided by this Court Jan. 18, 1915.) The takers of the land took from the deceased allottee. It was his land they took and their rights are governed and must be governed in exactly the same way as if he had taken the land before his death.

In the case of *Shulthis* v. *McDougal*, 170 Fed. 529, the learned court held that the allotment of Andrew J. Berryhill was ancestral and that he obtained the allotment by reason of his blood and that this blood came from his father. It is true that he became entitled to enrollment by reason of his Creek citizenship; but that does not mean that he inherited anything from his father in the sense in which the term was used in the Arkansas statutes. The statute was meant to apply directly to the property and was intended to give character to the inheritance as it conveyed the *property*. The *status* of Andrew J. Berryhill was necessary to his obtaining title to the property but it was no part of the title. He might have obtained the status in some other

way. He might have become a Creek citizen by adoption; but he would still have obtained an allotment in the Creek Nation, if he had become a member of the tribe. On the other hand, he might have been a Creek Indian by blood, but yet by non-residence he could have forfeited his right to citizenship (Sec. 21 Act June 28, 1898, 30 Stat. 495). For a person to become entitled to pre-empt or homestead public lands of the United States, he must be a citizen of the United States or have filed a declaration of intention (Rev. Stat. Sec. 2289); but still, the fact that a homesteader was a citizen of the United States by virtue of being a son of a citizen of the United States would not make his homestead an ancestral estate, so that upon his death it would go to his father. *Magness* v. *Arnold,* 31 Ark. 103; *Hogan* v. *Finley,* 52 Ark. 55, 11 S. W. 1035.

The trouble with the decision in the case of *Shulthis* v. *McDougal* is that the court confuses the *status* of Andrew J. Berryhill as a member of the Creek Tribe with his *title* to the allotment. The connection between the two is not necessary but only incidental. (*McKee* v. *Henry,* 201 Fed. 74.)

Citizenship in Creek Nation Not a Property Right at All.

This is settled by the *Cherokee Intermarriage Cases,* 203 U. S. 76, 51 L. ed. 96. In that case it was held that citizenship in the Cherokee Tribe or

Nation and property rights in the property of that nation were distinct things. This court quotes the decision of the Court of Claims, rendered in the same case, as follows (p. 84; 51 L. ed. 100):

> "These constitutional amendments were brought about by the action of the United States at the close of the Civil war in dictating that the slaves or freed persons of color in the Cherokee country should not only be admitted to the rights of citizenship, but to an equal participation in the communal or common property of the Cherokees. * * * Under the policy of the Cherokees, citizenship and communal ownership were distinct things. The citizen who annually received an annuity derived from the communal fund held by the United States, and the citizen who never received a dollar from the fund, or never so much as thought of receiving it, form a concrete object lesson in constitutional law not easily effaced from the common mind."

Further in the opinion the court quoted certain sections of the Cherokee Constitution of 1839, and said that the provisions did not amount to a grant of property rights. This opinion, as construed by the writer of this brief, decides that property rights in the lands and moneys of the tribe are entirely distinct from citizenship in the tribe and have no necessary relation thereto, and so also do the next two opinions referred to.

In the case of *Wallace* v. *Adams*, 143 Fed. 716, Judge Sanborn in an opinion which has been read

and quoted oftener than any other of the Circuit Court of Appeals, (so often that the pages containing the case in the volume in the Muskogee Law Library are blackened by use and the volume naturally falls open at the opinon), held that the matter of enrolling citizens of the Choctaw Nation was legislative and not judicial. This case was affirmed by this court in 204 U. S. 415, 51 L. ed. 547. It was held in these cases that no property right was conferred by citizenship that would prevent Congress from providing for a review of the judgments of the United States Courts in the Indian Territory after they had become final.

In *Stephens* v. *Cherokee Nation,* 174 U. S. 445; 43 L. ed. 1041; this court, speaking of the contention that the act of July 1st, 1898, which extended the right of appeal in citizenship cases to this court, was invalid because retrospective, an invasion of judicial domain and destructive of vested rights, said (p. 478):

> "In its enactment Congress has not attempted to interfere in any way with the judicial department of the government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review, and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not,

is placed by the judgment of a lower court beyond the power of re-examination by a higher court though subsequently authorized by general law to exercise jurisdiction."

The Lands of the Creek Nation Prior to Allotment Belonged to the Creek Nation as a Political Body and Not to the Individual Members.

The lands of the Creek Nation did not belong to the individual members prior to their allotment. The title was in the nation as a political body. This is shown clearly by the treaty under which the land was patented to the Creeks. Article III of the treaty of 1833, (Kapplers Indian Affairs, Laws and Treaties, Vol. 2, 1904 edition) is as follows:

> "The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the land assigned said Nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—And the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, *and continue to occupy the country hereby assigned them.*"

The patent made in pursuance of this treaty dated August 11, 1852, after reciting some of the provisions of the treaty of 1833, proceeds as follows:

> "*Now know ye, that the United States of America*, in consideration of the premises, and in conformity with the above recited provisions,

of the treaty aforesaid, have given and granted, and by these presents do give and grant, unto the said Muskogee or Creek Tribe of Indians, the tract of country above described. *To have and to hold,* the same, unto the said tribe of Indians, so long as they shall exist as a Nation, *and continue to occupy the country hereby conveyed to them.*" (The words "and continue to occupy the country, etc." are italicized by the writer of this brief.)

The courts have passed on the question several times with reference to the lands of the various tribes. The title by which all of the Five Civilized Tribes held their lands prior to allotment was about the same. There was no material difference in the character of title in the Creek land and the land of the Cherokees. In the case of *Eastern Cherokees* v. *United States and Cherokee Nation,* 117 U. S. 312, 29 L. ed. 880; the Eastern Band of Cherokees sued for a proportionate part of the funds belonging to the Cherokee Nation, derived from the sale of certain lands, part of which were west of the Mississippi River. This court denied the right to recover and among other things said:

> "Their claim, however, rests upon no solid foundation. The lands, from the sale of which the proceeds were derived, belonged to the Cherokee Nation as a political body, and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest as a tenant in common that he could claim a pro rata proportion of the proceeds of

sale made of any part of them. He had a right to use parcels of the lands thus held by the Nation, subject to such rules as its governing authority might prescribe; but that right neither prevented nor qualified the legal power of that authority to cede the lands and the title of the Nation to the United States."

In *Stephens* v. *Cherokee Nation* and kindred cases, reported in 174 U. S. 445; 43 L. ed. 1041, already quoted, the court said (p. 488):

> "But in any aspect, we are of the opinion that the constitutionality of these acts in respect to the determination of the citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradicition in terms."

In the case of *Journeycake*, cited by Judge AMIDON in the *Shulthis* case, Mr. Justice BREWER, speaking of the interests of certain Delaware Indians in the lands of the Cherokees, said (155 U. S. 197, 215; 39 L. ed. 120, 125):

> "That interest being like that of the native Cherokees limited to a mere occupancy of the tracts set apart for homes, with the right to free use in common of the unoccupied portion of the reserve, and the right to share in any future allotment."

The case of *J. E. Fleming, et al.* v. *Green McCurtain, et al,* 215 U. S. 56, 54 L. ed. 88, was a suit brought on behalf of several thousand persons claiming to be Choctaws and Chickasaws by blood, for their share of tribal properties, and asking to have a trust declared therein in their favor. This court, speaking by Mr. Justice HOLMES, said (p. 59):

> "As we cannot agree with this construction, it will be unnecessary to consider many of the further allegations of the bill. The foundation of the plaintiff's case is upon the words of the treaty and the patent we have set forth. Those words seem to us to convey a different meaning on their face,—a meaning that could not be changed, but rather confirmed, if we were to refer at length to the earlier and later dealings with the tribes, which we shall not need to do."

A very plain declaration of the status of the lands of the Choctaw tribes was made by Judge HOOK of the Eighth Circuit Court of Appeals in the case of *Ligon* v. *Johnson,* 164 Fed. 670, he said:

> "That the lands involved were public lands, belonging to the Choctaw and Chickasaw Nations and not to the individual members, has been assumed without contradiction from the inception of the titles through a long sequence of acts of Congress and treaties and agreements with the tribes. True, as contended, the title so held has frequently been referred to as being held in trust for the members of the tribes, but it is only in the broad comprehensive sense in which the *public property of any government is in trust for the welfare of its people.* Until

specific, private, individual rights attach pursuant to law, the enforcement of such trusts must be at the bar of public conscience. They are not justiciable by the courts."

In the case of *McKee* v. *Henry,* 201 Fed. 74, the court said:

"The enrolling primarily established the right of citizenship, and only incidentally conferred the right to allotment, and until allotment was made no inheritable right vested in the individual Indian.

"The title, so far as here pertinent, of the Creeks, was identical with the title of the Cherokees to their lands, and in *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 307, 23 Sup. Ct. 115, 120 (47 L. ed. 183) it is said:

'Whatever title the Indians have is in the tribe and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. *The Cherokee Trust Funds,* 117 U. S. 288, 308 (6 Sup. Ct. 718, 29 L. ed. 880). The manner in which this land is held is described in *Cherokee Nation* v. *Journeycake,* 155 U. S. 196, 207 (15 Sup. Ct. 55, 60; 39 L. ed. 120), where this court referring to the treaties and the patent mentioned in the bill of complaint herein, said: "Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them".'

"As already suggested, if enrollment conferred a vested interest in any lands, why did it not confer a vested interest in any money or other property belonging to the tribe? Yet, it has been held that the power of Congress to admit new persons to the rolls, thereby depleting the amount which would go to those previously on the rolls, is political in its character, and not within the control of the courts. *Muskrat* v. *United States,* 219 U. S. 346, 31 Sup. Ct. 250, 55 L. ed. 246.

In *Woodbury* v. *United States,* 170 Fed. 302, 95 C. C. A. 498, this court characterized the right of an Indian long after his enrollment, but before allotment, as 'a mere float—giving him no right to any specific property'."

In the case of *Delaware Indians* v. *Cherokee Nation,* 193 U. S. 127; 48 L. ed. 646, this court speaking by Mr. Justice DAY said:

"The provisions of the Cherokee constitution and the statutes passed in pursuance thereof pertinent to the subject are collected in the opinion of the Court of Claims in the *Journey-cake* case, and are cited in a note to the opinion of this court in the same case. 155 U. S. 207, 39 L. ed. 124, 15 Sup. Ct. Rep. 55. From them it is apparent that lands to be held upon the same terms as the Cherokees hold their lands cannot be alienated by those who occupy and hold them but the ownership is lodged in the Cherokee Nation. The individual has no right to alienate or lease the lands. The Nation grants and restricts the right of occupancy. The title to the lands is vested in the government, to be held

and controlled in such wise as to promote the general welfare."

See also *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 47 L. ed. 183.

The last and plainest declaration of the status of the Creek lands prior to allotment is contained in the opinion of this court delivered by Mr. Justice VAN DEVANTER, December 21, 1914, in the case of *William Sizemore, et al,* v. *Foil M. Brady.* In that case the court said:

> "Anterior to the legislation which we must consider, the Creek lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. *It was neither alienable or descendible.*" (Italics, by the writer of this brief.)

Further in the opinion, the court said:

> "On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant *in praesenti,* and invested every living member of the tribe and the heirs, designated in the tribal laws, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without

violating the due process of law clause of the 5th Amendment to the Constitution. To this we do not assent. There was nothing in the agreement indicative of a purpose to make a grant *in praesenti*. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe, or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled, if living. In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate* v. *Trapp*, 224 U. S. 665, 671; 56 L. ed. 941, 944; 32 Sup. Ct. Rep. 555.

"In principle it was so held in *Gritts* v. *Fisher*, 224 U. S. 640; 56 L. ed. 928; 32 Sup. Ct. Rep. 580. There an act or agreement of 1902, had made provision for allotting and distributing the lands and funds of the Cherokees in severalty among the members of the tribe who were living on September 1, 1902, and an act of

1906 (32 Stat. at L. 137, chap. 1876) had directed that Cherokee children born after September 1, 1902, and living on March 4, 1906, should participate in the allotment and distribution. By enlarging the number of participants the later act operated to reduce the distributive share to which each would be entitled, and because of this the validity of that act was called in question, the contention being that the prior act confined the allotment and distribution to the members living September 1, 1902, and therefore invested them with an absolute right to receive all the lands and funds and that this right could not be impaired by subsequent legislation. This court rejected the contention and said (p. 648): 'No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Intermarriage Cases,* 203 U. S. 76, 93; 51 L. ed. 96, 103; 27 Sup. Ct. Rep. 29. It was but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect, and while the tribal relations continued. *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 448; 43 L. ed. 1041, 1056; 19 Sup. Ct. Rep. 722; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294; 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Wallace* v. *Adams,* 204 U. S. 415; 423; 51 L. ed. 547, 551; 27 Sup. Ct. Rep. 363'."

The matters of enrollment and of allotment were entirely separate and distinct. It is true that by the treaty the right of allotment is made to depend upon citizenship but still the two rights could have been separate, and it was not because of any *necessary* relation between them that the one was made to depend upon the other. Prior to the allotment the title to the land was in the tribe just the same as the lands of the United States are in the United States until homesteaded by one of her citizens, and the father had nothing that the son could or did inherit. The individual ownership and descendible title of the father in *his* allotment began when his allotment was selected, just exactly as the son's title began in *his* allotment when *it* was selected. It was an entirely new and distinct estate from that which had existed in the tribe prior to the selection.

The term "estate" signifies the condition, relation or circumstance in which the owner stands with regard to his property (2 Minors Institutes, 3rd ed., p. 78). It is clear from the decisions cited and quoted that prior to allotment the individual members of the tribe had no individual title either legal or equitable. The title was in the tribe or nation as a corporate or political body and was in the nation no longer than it remained on the lands. The title in the nation was a base or qualified fee. (2 Blackstone, Lewis ed. 569, star p. 109; 2 Minors Institutes, 3rd ed., p. 86).

There was a contingent reversionary interest in the United States. The individual obtained his right to stay on the lands of the tribe *from the laws of the tribe and not from any property right* he had in the land. The title made by the treaty, selection of an allotment and patent made an entirely new title and estate in each allottee and it was a *new acquisition* in the person who first received it. In the case of *Shulthis* v. *McDougal,* Judge AMIDON stated that Andrew J. Berryhill received the land by virtue of his blood. This is not accurate. His blood, or rather his membership in the tribe, was merely a condition to his getting the land, and does not signify that he got the title from his faher. His blood was merely evidence of his membership in the tribe.

In the opinion of *Shulthis* v. *McDougal* the court seemed to take the position that the child, the deceased allottee, received the land some way unknown to the Arkansas law and for that reason the Arkansas Statute did not apply. The court says that in Arkansas there are no means of acquiring land except by grant, devise or inheritance, and then says that the Indian lands fitted into none of these classes. This reasoning is not sound. The land was granted from a sovereignty, who prior to the allotment had held the legal and equitable title to the deceased allottee of his heirs. It was a grant not merely technically but *substantially.*

The Arkansas Statute made all estates that were not derived from father or mother or relatives

in either the paternal or maternal line, new acquisitions. (*Kelly* v. *McGuire*, 15 Ark. 555). This land did not come that way because *neither father, nor mother nor any relative of either had ever had it.* It is not pretended that the father or mother or any relative of either gave or devised it to Andrew J. Berryhill. It is claimed though that he received it as a sort of *quasi* inheritance. But he could not have inherited it from his father because HIS FATHER WAS NOT DEAD. No one can be the actual complete heir of another until the ancestor is dead. *Nemo est hoeres viventis.* (2 Blackstone Lewis ed. 675; star page 208; 2 Minors Inst. 3rd ed. 519.) It will be a very remarkable phenomenon if Andrew J. Berryhill can inherit from his father and then his father, still living, inherit the same property back from him.

George Franklin Berryhill not only never owned the land but he never could have owned it had Andrew J. Berryhill not lived at the proper time to obtain it as an allotment.

The Court is most *earnestly* requested to consider this *proposition.*

If Andrew J. Berryhill had not received this allotment his father would not have received it. It would have been disposed of as provided in Section 9 of the Original Creek Agreement (31 Stat. 861) and used to equalize allotments and GEORGE

FRANKLIN BERRYHILL WOULD NOT HAVE BEEN ENTITLED TO ONE FOOT MORE OF THE LAND OR ONE PENNY MORE OF THE PROCEEDS OF ITS SALE THAN ANY OTHER MEMBER OF THE CREEK TRIBE SIMILARLY SITUATED. How then can it be said that Andrew J. Berryhill inherited it from him?

Specification IV.

The Supreme Court of the State of Oklahoma erred in holding that the evidence offered to the effect that the decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal* had not been followed or acquiesced in by the bar of the State of Oklahoma, or by the *nisi prius* judges, was not admissible.

The case of *Pigeon* v. *Buck*. 38 Okla. 101, 131 Pac. 1083, without much discussion followed the case of *Shulthis* v. *McDougal* and stated that to do otherwise would overturn what had become a rule of property.

The testimony of Mr. N. A. Gibson, a prominent member of the bar of the State of Oklahoma, begins on page 66 of the record. He testified that prior to the case of *Shulthis* v. *McDougal*, he advised his clients that an allotment of lands in any of the Civilized Tribes was a new acquisition; that prior to that decision it was the concensus of opinion among

the members of the bar practicing in the Indian Territory side of the State of Oklahoma that such allotments were new acquisitions. He testified that after that opinion was rendered he continued to advise clients that they should procure conveyances from collateral kindred as well as the parents of deceased allottees who died without issue. The question was asked him (Record page 68): "Bearing in mind the act of April 21, 1904, and the act of April 26, 1906, and the act of May 27, 1908, and bearing in mind that the opinion of *Shulthis* v. *McDougal, et al,* was rendered June 9, 1909, and appealed to the Supreme Court of the United States and dismissed for want of jurisdiction on the 7th day of June, 1912, what proportion of the titles where this question was involved, has been purchased on the theory that the parent only owned a life estate and what proportion on the theory that parent owned the fee?" He answered: "I should say that a very large proportion, probably 95% of all lands purchased from heirs of deceased Indian allottees have been purchased on the theory that the parent inherited the life estate only and not the fee." He also testified in substance that he was familiar with Bledsoe's Indian Land Laws and with an article read before the Bar Association of the State of Oklahoma. Mr. Gibson has practiced law in Oklahoma and Indian Territory for many years. He has been well known as one of the leaders of the bar of the state for years and has a large practice

in all the courts having jurisdiction of Indian questions, including this court.

The testimony of Mr. J. C. Stone begins on page 69 of the record. His testimony is the same in substance as that of Mr. Gibson. Mr. Stone is also a prominent member of the bar of Oklahoma with a wide practice in all the courts, including this one, and his standing is also indicated by the fact that the Supreme Court of Oklahoma offered him a place on the Supreme Court Commission of the state. (Record, page 70).

The testimony of Mr. Guy L. Andrews is found on page 86 of record. His testimony is to the same effect of that of Messrs. Gibson and Stone. Mr. Andrews is a leading member of the bar of McAlester, which is the principal court town of the Choctaw Nation. The testimony of Mr. Jean P. Day is found on page 88 of the record. His testimony is to the same effect as that of Messrs. Gibson, Stone and Andrews, and he said further (page 89) of record, that after the decision in *Shulthis* v. *McDougal,* the probate court continued to treat such titles as if the collateral kindred had an interest. Mr. Day was one of the compilers of the Oklahoma Code and is a prominent lawyer. Portions of Mr. Bledsoe's book on Indian Land laws were offered in evidence as Exhibits A., B., C. and D. to the testimony of Mr. Gibson. A paper read before the Bar Association of the State of Oklahoma was offered in

evidence as exhibit E. to Mr. Gibson's testimony. These exhibits are found in the record, beginning on page 73 and ending on page 83.

The plaintiff in error offered to prove the same facts by Mr. Gray Carroll, Mr. A. J. Biddison and Mr. C. S. Walker, all leaders of the Tulsa bar (record page 53). He also offered to prove the same facts by Mr. D. B. Hughes of the Sapulpa bar, since elected District Judge of his district. He also offered the testimony of Messrs. Frank P. Smith, J. F. Lawrence and L. O. Lytle of the Sapulpa bar, all prominent lawyers (record page 54). He also offered the testimony of Mr. Harry Campbell of the Tulsa bar to the same effect. He also offered to prove (record page 54) that several District Judges refused to follow the case of *Shulthis* v. *McDougal* and that the County Judge of Creek County had refused to follow it. (Record, page 55.)

This evidence was all excluded. In excluding it and passing on the case District Judge Poe, who tried this case in the District Court of Tulsa County, Oklahoma, said (record, page 65): "The decree will be of course in favor of the defendants, practically upon the pleadings and upon the exclusion of the evidence offered. I am satisfied all these things could be proven if it hadn't been that the Supreme Court had decided it. I think it is true, universally understood, that the members of the bar held the same opinion as you adhere to, but I don't think they have got the power to overrule our court of

last resort." (Judge Poe was referring to the Supreme Court of Oklahoma when he mentioned "Supreme Court" and "Court of last resort.")

In 11 Cyc. 755, it is said:

> "Where judicial decisions may fairly be presumed to have entered into the business transactions of a country and have been acted upon as a rule of contracts and property, it is the duty of the court, on the principle of *stare decisis*, to adhere to such decisions without regard as to how it might be inclined to decide if the question were new."

This is believed to be a fair statement of the doctrine of "Rule of Property."

In offering the excluded evidence the plaintiff in error believed that the question as to whether or not that decision had become a rule of property was one for the court to determine as one of fact, and while it might not be an *issuable fact*, it was yet a fact concerning which the court should *inform itself* and that he had a right to prove that the decision in *Shulthis* v. *McDougal* had not entered into the business transactions of the country where the land was situated. No case like this has been found, but the writer confidently believes it is the duty of a court to *inform itself* as to when a decision has become a rule of property. A court should not close its ears to offered information and judicially know something which the party, against whom the knowledge will operate, controverts the fact and offers infor-

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 676.

DANIEL A. McDOUGAL, - - *Plaintiff in Error,*

vs.

EDMOND McKAY, et al., - - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF PLAINTIFF IN ERROR IN ANSWER TO REPLY BRIEF OF DEFENDANT IN ERROR AND TO BRIEF OF *AMICUS CURIAE.*

It is a little difficult to write a reply brief without again traversing ground already gone over. But before entering into the controverted questions it should be stated that the plaintiff in error agrees with the position taken in Point One of defendants in error's brief on page 5 thereof.

The application of the Arkansas law of descent should be just the same in this case as if Andrew J. Berryhill had survived to receive his allotment and had then died intestate.

Now this question is referred to in our original brief, but that was before the *amicus curiae* brief had been written in the case, and as it was known that counsel for defendants in error, held the same views on this subject as are entertained by counsel for plaintiff in error, but little attention was paid to the question. As the question is well covered by the brief of defendants in error, but little will be said here on this subject.

The *amicus curiae* bases his argument on the proposition that Section 7 of the Supplemental Creek Agreement (32 Stat. L. 500), in providing that the lands and monies to which a deceased child who died after May 25, 1901, and before receiving his allotment, should descend to his heirs "and be allotted and distributed to them accordingly," used the term "heirs" merely as *descriptio personae,* and that it being ascertained who the heirs were, they all would take equal shares without reference to the share they might have taken had the allottee died after receiving his allotment and the land descended to the heirs in the technical sense.

This proposition is not well founded. The commissioners and persons representing the Creek Nation in using the language contained in Section 7 meant that the property should go to the same per-

sons and in the same way as if the allottee had died after the allotment was made. In addition to the able argument made by defendants in error under Point One referred to above, and also in reply to the brief of John B. Meserve, *amicus curiae,* beginning on page 65 of defendants in error's brief, it is believed that a further argument in support of this view is found in the language of other acts of Congress upon the same and similar subjects. The commission representing the government undoubtedly had in mind that the disposition of lands in the same condition as this land, should be the same in all the tribes. Section 22 of the Choctaw-Chickasaw Supplemental Agreement (32 Stat. L. 641) is as follows:

> "If any person whose name appears upon the rolls prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted *in his name,* and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in Chapter 49 of Mansfield's Digest of the Statutes of Arkansas; *provided,* that the allotment thus to be made shall be selected by a duly appointed *administrator or executor.*" (Italics by the writer.)

It is seen from this language that at least in the Choctaw and Chickasaw Nations the word "heirs" was not used in the *descriptio personae* sense, and

it seems clear that under that statute the provision requiring it to be allotted in the name of the deceased allottee, and also the provision that the allotment should be selected by a duly appointed administrator or executor, was intended to make it beyond question that the lands should be considered as having belonged to the allottee himself and actually descending to his heirs. As the Choctaw and Chickasaw Treaty was concluded only a few days after the Creek Supplemental Treaty, it is believed that the provisions of Section 7 of the Creek Treaty were intended to mean the same thing.

Further, Section 5 of the Act of April 26, 1906, (34 Stat. 137) provides that

> "all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued, shall issue in the name of the allottee and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions shall have been removed, his property shall descend to his heirs or his lawful assigns as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect."

Section 32 of the Act of June 25, 1910 (36 Stat. 855) is as follows:

> "Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in

> pursuance of any Tribal Agreement or Act of Congress, to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to, and become vested in the heirs, devisees or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life.

It is believed that these sections just quoted constitute a legislative interpretation of the language of Section 7 and show beyond question that it was the intention of Congress that the same persons should take as heirs under Section 7 (as well as under similar language in all treaties) as would have taken under a technical inheritance where the ancestor died after the allotment was made to him leaving the same persons surviving him as his heirs, and show that the word "heirs" was not used as *descriptio personae.*

The plaintiff in error contends the estate of Andrew J. Berryhill was a new acquisition.

Defendants in error, in Point Two of their brief, at page 38 thereof, assert the reverse of this proposition; and at this point begins the controversy between the parties. Counsel for defendants in error begin their argument under this point by asserting, as was asserted by the learned judge in the case of *Shulthis* v. *McDougal* (170 Fed. 529) that the Arkansas law of descent cannot be made to fit with technical precision the descent of Indian allotments, but

they do not point out, at least satisfactorily to the writer, the reasons why it does not fit with technical precision. If it be true, as contended by plaintiff in error, that no individual of the tribe had any title in the lands of the tribe, prior to allotment, then the Arkansas law does fit with technical precision, because a new estate was at that time created in the allottee.

The court will note that under the original Creek treaty no persons were entitled to enrollment or allotment except "all citizens who were living on the first day of April, 1899, entitled to be enrolled," etc., and "all children born to citizens so entitled to enrollment, up to and including the first day of July, 1900, and then living," etc. (31 Stat. 861, Sec. 28 Original Creek Treaty.)

Andrew J. Berryhill did not come within either of those classes. He was born in May, 1901, and lived until November, 1901, and his right to enrollment and to allotment was created by Section 7 of the Supplemental Creek Agreement. If that agreement had not been entered into, his birth and his Indian blood would not have entitled him to enrollment, and would not have entitled his father, George Franklin Berryhill, to any portion of the lands of the Creek Nation more than had already been conferred upon him by the original Creek treaty. Andrew J. Berryhill's right to enrollment as well as his allotment was created by this statute and was a new acquisition in him.

Members of the Creek Tribe who were living up until the first day of April A. D. 1899, but who died before that day, though it might be on the last hour of March 31, 1899, were not entitled to enrollment and had no share of the lands that could descend to any one, and as to children situated as was Andrew J. Berryhill, those born subsequent to July 1, 1900, but who had died at any time prior to May 25, 1901, though they had Indian blood, were not entitled to enrollment and had no interest in the lands that would descend to any person; so that not only does the Arkansas law of descent fit these cases but it fits them with technical precision, and it would seem with more than ordinary technical precision; because it would seem that such estates as Andrew J. Berryhill's were new acquisitions in the strongest sense of the term. Merely being a member of the tribe carried with it NO PROPERTY RIGHT.

In the case of *Franklin* v. *Lynch*, 223 U. S. 269, this court, speaking by Mr. Justice LAMAR, said that

> "the statute did not authorize white *members* of the tribe to sell future acquired property but did permit non-Indian *allottees* to sell what had been actually assigned to them in severalty. Cf. 34 Stat. at L. Sec. 19, p. 144, Chap. 1876. The distinction between a *member* and an *allottee* is not *verbal*, but was made in recognition of a definite policy in reference to these lands. The revised statutes (Sec. 2118) declare that no conveyance from an Indian Tribe shall be of any validity in law or in equity unless authorized

by treaty. As the tribe could not sell, neither could the individual members, for they had neither an undivided interest in the tribal land nor a vendible interest in any particular tract."

IT IS THE CONTENTION OF PLAINTIFF IN ERROR THAT THE TREATIES PROVIDING THE DATE ON WHICH ALL LIVING MEMBERS SHOULD BE ENROLLED FOR ALLOTMENT PLACED EACH MEMBER ON A PARITY AND WAS INTENDED TO CREATE, WHEN THE ENROLLMENT ACTS WERE COMPLIED WITH, A NEW ESTATE IN EACH MEMBER OF THE TRIBE TAKING AN ALLOTMENT AND THAT THE TITLE PREVIOUSLY HELD BY THE TRIBE AS A POLITICAL SOCIETY WAS EXTINGUISHED AND A NEW TITLE CONVEYED TO THE ALLOTTEE. THAT THE NEW TITLE WAS CREATED BY THE TREATIES AND PATENT AND WAS IN EVERY SENSE OF THE WORD A NEW ACQUISITION.

The case of *Kelly* v. *McGuire* (15 Ark. 555) has been quoted and re-quoted to this court, and to every other court that has ever had anything to do with these Indian questions. (The back is off the volume the writer is now referring to though the balance of the same set is in very good condition), but it is hard to see where the defendants in error get any consolation out of that case. It is said near the beginning of the opinion (page 584):

"The first section is general and comprehensive, embracing all lands, whether ancestral or newly acquired, subject to certain exceptions and qualifications hereafter more particularly noticed, *and these exceptions refer to real estate alone.*" (The italics are by the writer.)

But at page 586 where the court passes to the consideration of the 10th section, it is shown what exceptions are referred to and it is clear that a new acquisition did not follow the line of descent marked out in the first section. This case, as stated in the original brief, has been followed from the time it was written to the present time, and it is believed to be a learned and able opinion. Certainly if it had become the settled law of Arkansas at the time the Arkansas statute of descent was extended in Indian Territory, it should be followed by the courts in construing the Arkansas statute. (*Adkins* v. *Arnold*, U.S. Sup., decided Dec. 14, 1914.) *Kelly* v. *Mc. Guire*, was referred to in the case of *Martin* v. *Martin*, 135 S. W. 349, decided February 20, 1911. In that case the court refers to the decision in *Brown* v. *Whaley*, 58 Ohio St. 654; 65 Amer. St. Reports, 793, where it was said that a deed of real estate from a father and mother to their daughter in consideration of love and affection and dutiful obedience and faithful service and in further consideration of one dollar, was not a deed of gift and that title so acquired came to the daughter not by deed of gift but by purchase. The rule on this subject is laid

down in Walker's American Law, (11th ed. Sec. 188, p. 409) as follows:

> "Our statutes divide all property for inheritance purposes into two classes: namely: *1.* Real estate which came to the intestate 'by descent, devise, or deed of gift from an ancestor;' and *2.* All other real estate, and also all personalty from whatever source derived. For convenience, the first class is generally called ANCESTRAL, and the second *non-ancestral* property. By *ancestral property,* then, is meant that realty which came to the intestate from his ancestor, *in consideration of blood,* and without a pecuniary equivalent, and which must have come either by descent or devise from a now dead ancestor, or by deed of actual gift from a living one. And by *non-ancestral property* is meant all personalty, and that realty which came to the intestate in any other way, whether by purchase from his ancestor or from a stranger, for an equivalent paid, or by actual gift from a stranger, so that the consideration of blood is out of the question; for this makes the sole distinction. Ancestor means one from whom the estate is inheritable, hence it may refer to a brother or uncle, but not to a deceased husband or wife, for the survivor did not inherit from the other in right of blood, and the term 'ancestor from whom the estate came' means the *immediate* ancestor.
>
> In determining what is ancestral property, the legal title controls. It is paramount to the equitable title, and to all extraneous evidence. Thus, if the legal and equitable titles come by separate channels to unite in the same person, the latter is merged in the former and follows

the course of descent that an exclusively legal derivation would have dictated. So if a deed expresses a valuable consideration, the title is one by purchase, and therefore non-ancestral, and parol evidence is not competent to show that it was, in fact, a deed of gift, and thus change the descent. A seeming exception occurs where heirs, owning inherited land in common, partition it by mutual deeds reciting money considerations. The ancestral quality of the estate remains, but this is because such partition, like that by decree, creates no new title. If one tenant in common in a partition case elects to take the land at its appraisement the share which he inherited is ancestral, and the acquired shares are by purchase and non-ancestral. But if two heirs, after partition, exchange deeds, both titles become non-ancestral, being held by purchase."

If the rule thus laid down by Mr. Walker is the true rule, then whatever equitable rights members of the tribe may have had in their lands did not affect the question. However, it is not believed that the members of the tribe had any equitable rights in the technical sense of the term. It is not believed that this court, when it used the language in the case of *Choate* v. *Trapp*, 224 U. S. 671, quoted at page 62 of brief of defendant in error as follows: "The individual Indian had no title or enforceable right in the tribal property but as one of those entitled to occupy the land he would have an equitable interest, which Congress recognized and which it desired to have satisfied and extinguished," intended

to say or to mean that the individual Indian had any equitable title to the land of any sort. It is believed that this court meant to say that the individual had a right which equity required Congress to recognize, but did not mean to say that he had a right that courts could recognize or that could pass to any one else until Congress had enacted some legislation establishing the right which equity, not in the technical sense, but in the sense of natural justice, required should be established.

The construction of the Arkansas statute contended for by plaintiff in error is established by a long line of Arkansas cases as well as cases from other courts. This construction should not be departed from by this court unless reason and technical reason demands it. There is nothing in Indian habits to require a departure from the established construction. It is not necessary to argue to this court the danger of departing from established constructions. To do so would render titles uncertain, rights unsafe, make it impossible for lawyers to advise clients with certainty or for *nisi prius* courts, who must depend for the law upon the decisions of higher courts and the language used in the decisions of higher courts and in the statutes, to know how to try cases.

The Supreme Court of Oklahoma held recently in the case of *Simpkins* v. *Ware* (145 Pac. 355) that a member of the Osage tribe of Indians had no interest in the lands of the tribe prior to the act pro-

viding for the enrollment and allotment of the members. That is the principle contended for here and it is further contended that the allotment act created the right of each allottee and that George Franklin Berryhill, the father, had no more to do with giving the land in controversy than any other member of the tribe.

Defendants in error argue that individuals had a right of occupancy in severalty which was descendible, and in which homestead rights existed; and they print an appendix to their brief, containing numerous decisions by the Creek courts with reference to homestead and inheritance rights in these rights of occupancy.

These decisions do not affect the question involved here. The tribe could, of course, regulate the right of occupancy, but it could not convey an individual title or interest in the land occupied. The title by which the tribe held the lands must be looked to for a solution of the question involved here. No light can be obtained from tribal laws regulating the occupancy of the surface which could not affect and did not purport to affect the title to the land.

Rule of Property.

The able counsel for defendants in error do not show much disposition in their brief to uphold the doctrine of "rule of property" laid down by the Supreme Court of Oklahoma in the case of *Pigeon*

v. *Buck*, but they refer to the case of *Thorn* v. *Cone*, decided by the Supreme Court of Oklahoma in which the rule laid down in *Shulthis* v. *McDougal* has been followed. That rule has also been followed in another case since the original brief was prepared herein, to-wit: the case of *Lovett* v. *Jeter*, 145 Pac. 334, but this court will see upon reading the opinion in that case that the district judge who tried the case below had refused to follow *Shulthis* v. *McDougal*, and it bears out the theory of plaintiff in error that the decision in *Shulthis* v. *McDougal* never became a rule of property in the State of Oklahoma.

The argument made by counsel for defendants in error that if *Shulthis* v. *McDougal* should not be followed or sustained in this court, that titles to inherited lands would be scattered and would give collateral relatives small parcels or small interests of small value, might appeal to the legislative department of the government if the case were before that department, but it cannot affect this court, if the law provides that the title shall be divided. The argument of inconvenience cannot be resorted to except as a last resort, and is not believed to have any application at all in a case of this kind. However, the argument made is not believed to be sound. The intelligent heirs who know the value of their interests will be able to protect themselves by refusing to sell for less than their true value, the probate courts will be able to see that minor heirs get

value for their interests, persons not so able to take care of themselves or so well protected will in some instances be defrauded, just as they have been in entirely too many instances defrauded out of their own allotments when they owned the entire interest. In many cases the multiplicity of interests has been a protection to all, for out of the number some one would know the value and advise the others interested. It does not take a high grade of business ability for a man to know that his eighth of a tract is worth as much as another man's eighth and to insist on getting it. But as stated in the original brief herein, practically all of the land of this sort has been sold, and sold on the theory that the parent only owned a life estate. To confirm such titles into fee simple estates would give the purchaser something the parent did not think he was selling, for a price less than he would have had to pay the parent had the parent believed he was conveying the fee simple.

It is respectfully submitted that this case should be reversed as requested in the original brief herein filed by plaintiff in error.

MALCOLM E. ROSSER,
Counsel for Plaintiff in Error.

WILLIAM S. COCHRAN,
Of Counsel.

Office Supreme Court,
FILED
MAR 6 1915
JAMES D. MAHE

No. 676.

In the

Supreme Court of the United States.

October Term, 1914.

DANIEL A. McDOUGAL, - - - *Plaintiff in Error,*

vs.

EDMOND McKAY, et al., - - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Reply Brief of Counsel for Defendants in Error.

GEO. S. RAMSEY,
EDGAR A. de MEULES,
Counsel for Defendants in Error.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 676.

DANIEL A. McDOUGAL, - - - *Plaintiff in Error,*

vs.

EDMOND McKAY, et al., - - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR.

May It Please the Court:

The following facts present the issue of law in this case:

1. Andrew J. Berryhill was born in May, 1901.

2. He died in November, 1901.

3. Being the child of a duly enrolled citizen of the Creek Nation by blood, to-wit, the father, the Dawes Commission, under the authority of section 7 of the Supplemental Creek Agreement (32 Stat. L.

500), enrolled the name of Andrew J. Berryhill as a Creek citizen by blood, said section 7 of the Supplemental Agreement being as follows:

> "All children born to those citizens who are entitled to enrollment as provided by the Act of Congress approved March 1, 1901 (31 Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

4. He left surviving, his father, George Franklin Berryhill, a duly enrolled Creek citizen by blood, and his mother, Clementine Berryhill, a non-citizen of the Creek Nation.

5. Andrew J. Berryhill, the deceased, was enrolled as a Creek citizen on October 8, 1902.

6. The land in question was allotted in his name in 1904, and patents were issued to the heirs of Andrew J. Berryhill in October, 1905.

7. The father, claiming to be the sole heir, executed, on June 5, 1906, a deed to Edmond and Perry McKay, and thereafter, and on August 9, 1910, Edmond and Perry McKay deeded an undivided one-third interest to John V. McKay. Edmond, Perry and John V. McKay, with Albert W. Shulthis, their

oil and gas mining lessee, are the defendants in error in this case.

8. The plaintiff in error claims the title in fee through conveyances executed to him along in August, 1907, by the uncles and aunts of the deceased, Andrew J. Berryhill, admitting, however, that the surviving father, George Franklin Berryhill, inherited an estate in said land for his lifetime.

9. It is conceded that the Arkansas law of descent, as put in force by section 6 of the Supplemental Creek Agreement, under consideration by this court in *Brady* v. *Sizemore,* 235 U. S. 441, controlled the devolution of the one-hundred-and-sixty-acre allotment.

Controversy.

The dispute revolves around the construction *and application* of section 2531 of Mansfield's Digest of the Laws of Arkansas, being section 10 of chapter 49 of Mansfield's Digest. Plaintiff in error contends that the one hundred and sixty acres should be treated as a new acquisition, and that under section 2531 of Mansfield's Digest, the father acquired an estate for his lifetime, the fee, subject to the father's life-estate, passing to the uncles and aunts of the deceased Andrew J. Berryhill. It is our contention that the estate was ancestral on the father's side, the mother being a non-citizen of the Creek Nation,

and that accordingly, the father took the entire fee simple title as the sole heir.

Andrew J. Berryhill having been born after July 1, 1900, and before May 25, 1901, was entitled to be enrolled as a Creek citizen, having survived May 25, 1901. If he had died prior to May 25, 1901, although born subsequent to July 1, 1900, he could not have been enrolled. If he survived May 25, 1901, his death after that date was immaterial, the allotment to which he was entitled would either be set apart to him while living, or to his heirs in case of his death, and section 7 declares that "the lands and moneys to which he would be entitled if living (meaning if living at the time he received an allotment some time after May 25, 1901) shall descend to his heirs as herein provided and be allotted and distributed to them accordingly." Of course having died prior to receiving his allotment his heirs took technically by purchase and not by technical inheritance. Nevertheless, we must resort to the Arkansas statute of descent to determine two things: *First*, who were the heirs; and, *second*, the shares and portions they acquired. It makes considerable difference as to whether we look to the Arkansas law to merely nominate the heirs where the allotment is made direct to the heirs, or look to the Arkansas law to ascertain the heirs and their shares and portions. If we look to the Arkansas statute merely to ascertain who the heirs are in a case like this where they take by purchase, and not technically by descent, the

heirs will take *per capita,* whereas, if we resort to the statute to name the heirs and fix their shares and portions, they will take *per stirpes.* There should be no difference in the application of the law of descent to heirs taking by purchase and heirs taking technically by descent, it being manifestly clear that the Creeks knew nothing about the difference in taking as to class *per capita* or by representation.

Point One.

Although the heirs of Andrew J. Berryhill did not technically inherit the land in question, yet the application of the Arkansas law of descent should be just the same in this case as if Andrew J. Berryhill had survived to receive his allotment and then died intestate.

The above proposition was held to be correct by the United States Court for the Eastern District of Oklahoma in 162 Fed. 331, and, likewise, by the United States Circuit Court of Appeals for the Eighth Circuit in *Shulthis* v. *McDougal,* 170 Fed. 530, involving another portion of this identical allotment of Andrew J. Berryhill. This court in *Washington* v. *Miller,* 235 U. S. 422, appears to have also taken this view. In holding that non-citizens were excluded under section 6 of the Supplemental Creek Agreement from taking as heirs in a case of actual descent, as well as where the land was allotted direct

to the heirs in the first instance, this court held in *Washington* v. *Miller, supra,* that the word "heirs" was used without any accompanying explanation of who was intended "but this evidently was because the word was intended to have the same signification as in section 7 and section 28 and therefore no further explanation was necessary."

See also *Brown* v. *Belmard,* 3 Kan. 35, the opinion in which supports our contention that the law of descent should be applied as if the deceased had lived to receive his allotment.

If the court doubts the correctness of the above point, we invite a consideration of the following argument:

It will not be controverted that Congress had the power and the option to pass an act, with the consent of the Creek Nation, conveying the title to this land to the heirs of Andrew J. Berryhill, in the same manner, in the same right, and in the same condition as if the land had actually passed to them, technically, by inheritance.

Whether they took technically by inheritance or by purchase is absolutely of no importance. When we examine sections 6 and 7 of the Supplemental Agreement it will be seen that no distinction was intended to be made in the rights and estates conferred upon heirs by purchase, from those conferred upon heirs by descent or inheritance, technically speaking. In determining who the heirs of Andrew

J. Berryhill are, and what title and estate they acquired, the court will look to the Arkansas statute of descent, just as if he had received this land as his allotment during his lifetime by patent from the Creek Nation and died intestate. There was no intention to differentiate between heirs taking by purchase under the treaties and heirs taking strictly by inheritance and by descent. The language of sections 6 and 7 makes it too obvious for dispute. Section 6 of the Supplemental Agreement says:

> "The provisions of the Act of Congress approved March 1, 1901, insofar as they provide for *descent* and distribution *according* to the laws of the Creek Nation, are hereby repealed, and the *descent* and distribution of land and money provided for by said act shall be *in accordance with* chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in the Indian Territory."

It not merely repeals the Original Agreement, but *substitutes* chapter 49 of Mansfield's Digest, and declares that the *descent* and distribution of land and money shall be *in accordance with* said chapter 49. Section 7, under which Andrew J. Berryhill was enrolled, provides that: "And if such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, *if living*, shall *descend* to his heirs as *herein provided*, and be allotted and distributed to them *accordingly*."

If it were intended by the lawmakers to give to heirs taking as purchasers a different estate from heirs by descent, technically speaking, *why provide for and require first the enrollment of such deceased as a citizen of the Creek Nation?* The answer to that is this: The lands were to be allotted in severalty by the Commission only to citizens whose names appeared upon the authenticated and approved rolls of citizenship. These rolls of citizenship made up the aggregate list of units to whom the lands of the Creek Nation were to be set apart and conveyed. The dead citizen *was* however the *unit of allotment* and so held by the Secretary of the Interior in a written opinion. Andrew J. Berryhill, the deceased, could not, technically speaking, be a grantee. Lands cannot be granted to a dead person. *Russell* v. *Hall*, 101 U. S. 53-14, 25 L. ed. 829. There was a reason for first placing the name of a dead citizen upon the rolls. In fact and in law a party was not a citizen of the Creek Nation until his name was enrolled by the Commission to the Five Civilized Tribes. The Commission had to look to the rolls in order to ascertain to whom to set aside an allotment. In this case no allotment was made until after Andrew J. Berryhill was enrolled as a citizen of the nation. The act plainly says: "The lands and moneys to which he would be entitled, if living, shall descend to his heirs." This shows that the heirs, while taking by purchase, technically speaking, were to take the allotment, however, by virtue of being "successors"

to Andrew J. Berryhill, deceased. Not only does the act plainly to say: "The lands and moneys to which he would be entitled, *if living,* shall descend to his heirs," but says: "shall descend to his heirs as *herein provided.*" How is it herein provided? Where is it *herein provided?* It is *herein provided* in section 6, just above section 7, where it is plainly provided that it shall descend "*in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas.*" Section 6 not only repealed sections 7 and 28 of the Original Agreement, but substituted in lieu of the Creek law, the Arkansas statutes, and said plainly, "and the descent and distribution of land and money provided for by said act shall be *in accordance with* chapter 49 of Mansfield's Digest." We concede that the word descend and the word descent are, technically, inappropriate where the citizen died before getting his allotment, but if they have any meaning it must be ascertained and given. *The words were not used inappropriately when the allottee died after having acquired the allotment during his lifetime.* Where a citizen selected his allotment during his lifetime, but died before the patent was issued, his heirs take by descent, and not by purchase. *Goat* v. *U. S.*, 224 U. S. 458; *Jones* v. *Meehan,* 175 U. S. 1. The words "descend" and "descent" were accurately and technically appropriate insofar as the estates of dead allottees obtaining their allotments during their lifetime is concerned. If Andrew J. Berryhill had received his allotment

during his lifetime, it would have, technically speaking, descended to his heirs and been inherited by his heirs in the strict, technical, legal sense of the word. The heirs, if he had died the owner of the allotment, would have been not only determined and nominated by the Arkansas statute, *but their shares and proportions would have been fixed and also determined by the Arkansas statute.* The conclusion, therefore, inevitably follows that Congress and the Creek Nation, under the provisions of sections 6 and 7, intended to convey to the heirs of any citizen dying before receiving his allotment, the same estate, the same share, and the same portion they would have taken by strict inheritance in the event he had lived to receive his allotment and then died seized of the allotment. It is certain that Congress and the Creeks *never had the slightest idea or intention of making any distinction or difference between the application of the Arkansas law of descent and distribution to a case of strict and technical inheritance and a case where the allotment passed to the heirs, as purchasers or as representatives of the deceased. Sections 6 and 7 are worded with a view to cover both classes of cases.* But a clear legislative intent is shown by the language of sections 6 and 7, to pass to the heirs where they take by purchase, the same estate and share, under the same conditions and in the same manner, as if the deceased had died seized and possessed of the land, leaving it as an inheritance. The act says: "The lands and moneys

shall descend in accordance with chapter 49 of Mansfield's Digest." "According to," and "according to law," are phrases of well-known import and meaning. If the act had said, "the land and money shall *go to or inure* to the heirs in accordance with chapter 49 of Mansfield's Digest," the result would be exactly the same. Where an act of the Legislature or a contract says a thing shall be done "according to" or "according to law," the thing or the law referred to is by implication carried *verbatim* into the act or contract. Chapter 49 of Mansfield's Digest of the Statutes of Arkansas should be read into sections 6 and 7 as if set out in *haec verba*. The law of descent should be applied as if he had lived to receive an actual allotment.

Some Authorities.

In a recognizance the obligor was recognized in a certain sum as bail, "according to act of assembly;" and the words "according to" must be construed as making the act of the assembly which fixes the condition of the recognizance part of the recognizance.

—*Harvey* v. *Beach*, 38 Pa. 500;
Words and Phrases, pages 84 and 85;
Duffy v. *Hargan*, 50 Atl. 678.

The domain of the Creek Nation was owned by the tribe as a political entity. The tribe in 1901, by the Original Agreement, consented to the allotment

of the lands among the citizens in severalty. Here, therefore, was a vast and valuable estate to be administered and wound up. The tribal government was practically emasculated in 1898. The Creek laws were abrogated in 1898, and the Creek courts abolished. 30 Statutes at Large 495, Secs. 26 and 28; *Reynolds* v. *Fewell*, 236 U. S. ..... This valuable landed estate of the Creek Nation went into process of administration, to be allotted among the beneficiaries, its citizens.

In the ninth annual report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1902, said report being drafted after the Act of Congress of May 27, 1902, and before the ratification of the Supplemental Agreement, the Commission uses the following significant words:

> "Should the Supplemental Creek Agreement fail of ratification by the tribe, the exigency will be in a measure met by the provisions inserted in this bill looking to the enrollment of Creek children, and to the descent and distribution of the lands and moneys of that tribe."

It was the purpose of the Commissioners as the representatives of the government to bring about an equitable distribution and an equitable equalization of the lands and moneys of all of the Five Civilized Tribes among their citizens, and this was the guiding star in making the treaties and the divisions of the property. The provisions contained in section 6 of the Supplemental Agreement providing for the en-

rollment of children born after July 1, 1900, was inserted in the Supplemental Agreement at the instance of the Commissioners for the Creek Nation and at their request and solicitude.

In the eighth annual report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1901, the Commission says in regard to the Original Agreement:

> "Certain portions of the agreement were not acceptable to the members of the tribe and approval on the part of the councilmen was given only with the understanding on their part that the agreement might be supplemented in a manner to correct inaccuracies and discrepancies and make clear those portions which appear ambiguous. It may be safely stated that the tribe as a whole desires that all children born up to and including May 25, 1901 (the date of the ratification of the agreement), be enrolled. Under the agreement ratified by them (that is, the Original Agreement) no child born subsequent to July 1, 1900, may be enrolled. In this and certain other particulars, it is believed that the agreement should be amended, and steps to this end will doubtless be taken in the near future."

In the preface of the eighth annual report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1901, in discussing the condition of affairs in the Five Civilized Tribes, the Commission says:

> "To allot them land upon any other principle than equality of value would remedy none

of the evils arising from the unequal distribution of land which have so long existed; while to apply this principle, as the law provides, involved one of the largest, most intricate and difficult undertakings in which our government has ever been engaged."

In every agreement made with each of the Five Civilized Tribes, and in the Curtis Bill passed in 1898, providing for the allotment of the lands, there is practically the same declaration that the lands shall be allotted among the citizens, "giving to each, as far as possible, his fair and equal share thereof."

In the preface to the ninth annual report of the Commission, for the fiscal year ending June 30, 1902, the Commission says, in speaking of the object and purpose of the United States and the work of the Commission:

"Debilitated governments, through the art of diplomacy, were to be bethroned; communal land holdings transmuted to individual ownership; the *bona fide* members of the tribes to be identified, and all with the least possible hazard to political and property rights. Through the legislative function, agreements which are to become law for the *administration of these estates* are negotiated. Through the judicial the right to participate as members of the tribes is adjudicated, and contentions between members involving the right to possession of given tracts are determined. Through the executive, the laws governing many matters affecting the property of the Five Tribes are administered."

In the tenth annual report of the Commission for the fiscal year ending June 30, 1903, on page 8, the Commission says:

> "Manifestly, two indispensable duties lay at the very beginning of the business. *First,* to determine who were the *bona fide* citizens or heirs entitled to inherit these properties; and, *second,* to take an inventory of the properties to be divided. When these two tasks had been performed as to any tribe, then only was it possible to begin the intelligent and *equitable division of its estate.*"

On page 9 of the same report the Commission says:

> "The work of determining the rightful citizens or heirs and of getting the properties into necessary shape for distribution was all indispensable preliminary work, and by far the greater part of the work to be done."

Thus it will be seen that an equitable equalization was the guiding star in allotting and distributing the domain and funds of the nation. *If heirs taking by purchase were to have a different estate from those taking by strict descent an equitable equalization was impossible.*

In the 7th section of the Supplemental Agreement it recognized this right to an allotment of 160 acres of land to "all children born to those citizens who were entitled to enrollment, as provided by the Act of Congress approved March 1, 1901, subsequent to July 1, 1900 (and up to May 5, 1901), and living

upon the latter date," requiring such children to first be enrolled upon the list of beneficiaries. This roll of beneficiaries and devisees was to be made by the Commission, we might say, as executors with the will annexed—that is, the treaty or agreement. This devise of 160 acres was made to every such child born after July 1, 1900, and living May 25, 1901. The will, that is, the agreement, declared that in the event such child had died prior to receiving the allotment, the same should pass to his heirs, "*in accordance with* chapter 49 of Mansfield's Digest of the Statutes of Arkansas."

With this analogy, let us turn to the numerous decisions of the courts defining the rights of devisees under wills, where the devise is made, we will say, to John, and in the *event of his death,* to the heirs at law of John. The courts have repeatedly construed such devises or bequests, and we believe the decisions construing wills devising property to A, or to the heirs of A, will furnish a correct solution of this problem and a correct construction of sections 6 and 7 of this Supplemental Agreement. The question therefore recurs: Shall we look to the Arkansas law to ascertain who the heirs are, and there stop, or shall we look to the Arkansas law to determine, *first,* who the heirs are, and, *second,* the share or portion taken by such heirs?

A devised 100 acres of land to the heirs of B. The heirs of B necessarily took by purchase.

With this statement, let us examine the decisions:

In *Mullen* v. *Reed,* 64 Conn. 240 (42 Am. St. Rep. 174), the Supreme Court of Connecticut had under consideration the effect and meaning of the words "heirs at law," as used in a benefit certificate of membership in the Bay State Beneficiary Association, wherein the association agreed "to pay to the *heirs at law* of said member, in sixty days after due proof of the death of said member, a sum equal to the amount received from one death assessment, but not to exceed five thousand dollars."

It is clear that the heirs at law of the member did not acquire by inheritance the sum agreed to be paid by said membership certificate. They would take said sum as first takers, that is, by purchase—in other words, as donees. They took just as the heirs of Andrew J. Berryhill took. The court said:

> "Heirs at law, when used in such an instrument, indicate an intent that such persons are to take in the *same manner,* and in the *same proportions* as if the property had come to them as intestate estate, unless the contrary intention appears."

The court cites and approves the Massachusetts cases, and especially *Houghton* v. *Kendall,* 7th Allen 72, wherein the Supreme Court of Massachusetts said:

> "In this commonwealth, we find no authority which would conflict with the adoption of the

construction which seems to us reasonable, that when the word 'heir' is used in the gift of personalty it should primarily be held to refer to those who would be entitled to take under the Statute of Distributions, and to indicate that they should take in the *same manner* and in the *same proportions* as if it had come to them as intestate estate of the person whose heirs they are called."

The court cited and approved the following cases, all of which we have read and find to fully sustain our contention:

Sweet v. *Dutton*, 109 Mass. 589;
White v. *Stanfield*, 146 Mass. 424, 15 N. E. 919;
Kendall v. *Gleason*, 152 Mass. 457, 25 N. E. 838;
Bassett v. *Granger*, 100 Mass. 348;
Rand v. *Sanger*, 115 Mass. 124.

Heirs, or heirs at law, technically, mean those succeeding by inheritance to the real estate of the ancestor. *Next of kin,* technically, mean those succeeding to the personal estate of the ancestor.

A great many decisions have discussed the intention of the testator when he used the words heirs, or heirs at law, when his will only disposed of personal property, and the decided weight of authority holds that in such cases the testator intended to have his personal estate pass to those nominated by the statute of distribution, instead of those nominated

as heirs by the statute of descent. It is not important in this case to go into a discussion of the distinction between heirs at law and next of kin as used by testators in their wills. Sometimes they are used interchangeably.

In *White* v. *Stanfield, supra,* the testator left in trust for his son the sum of ten thousand dollars, to be held by the trustee during the natural life of the son, to pay him the income thereof and to pay over the principal of said sum on his decease (the son's death), to his (son's) heirs at law. After discussing the question as to whether or not heirs at law meant those designated by the statute of descent or the statute of distribution, the will bequeathing only personal property and the testator having no real estate, the court said:

> "In the case at bar, those who are to take after the life estate do not take by way of succession or substitution, but as an independent substantive gift; but that which they were to take is personal property intended to be kept as such, and thus to be paid over at the decease of the life tenant, and, notwithstanding the use of the words heirs at law, it should be paid to his distributees, and one-half thereof to his widow, as a person so entitled *under the statute.* The words do not appear to have been used technically, nor would it have occurred to the testator unless his attention had been called to it by legal advice, that he was in danger by the use of them, of sending his *property* in a different direction from that it would have taken if it had actually been the *property of his son.*"

The court further said:

> "When a testator establishes a fund consisting of personal property for the purpose of providing an income for life for his son, and this is apparently his principal object, and when, after his son's decease, he directs it to be paid over to his *son's heirs at law,* his intention is not so much to make a bequest of it, or direct further how it shall go, as it is to *surrender* the disposition of the fund, *as if it were actually the son's,* to those upon whom the law would in such case devolve it."

The court then held that it passed to those nominated by the statute of distribution in the *same manner* as if it had been the property of the son during his lifetime, and in the *same share and portion prescribed by the statute,* just as the lawmakers intended the heirs of Andrew J. Berryhill to take—that is, in the *same manner,* and in the *same share and same portion, as if the allotment had been set apart to Andrew J. Berryhill during his lifetime.* The words of the statute make this plain.

In *Kendall* v. *Gleason, supra,* the testator devised certain property to trustees, who were to permit his three sons to occupy it. At the request of either of the sons the trustees were to have the property appraised and conveyed to any two of them who should wish to purchase at the appraised value, and if no two wished to purchase, the trustees were to sell the property. If the sons could not agree, the trustees were directed to sell the property and invest

the proceeds, one-third of which was to be paid to each son upon his arrival at the age of fifty years. The following language is worthy of note:

> "If either of my sons shall die before arriving at the age of fifty years, I direct his share to be paid by my said trustees to his legal heirs."

This is very similar to the language of the statute in question, wherein it is provided:

> "And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to *his heirs* as *herein provided,* and be allotted and *distributed* to them *accordingly.*"

One of the sons died before reaching the age of fifty. The court said:

> "On the death of Stillman A. Gleason, the trust terminated as to his share, which fund immediately became payable to his *legal heirs.* The will contemplated a change of the *real estate* to personal property in the hands of the trustees, and that it should go to the heirs in the form of personal property. The words legal heirs must therefore be construed to mean those who would take personal property under the statute of distribution. One-third of the fund held by the trustees should be paid to the heirs of Stillman A. Gleason, in the *proportions* of one-third to his widow, Mary E. Gleason, and two-thirds to his minor son, Benjamin W. Gleason, whose share will be held by his guardian."

In other words, the court not only looked to the statute to determine who the heirs were, or who the distributees were, but the share and portion taken by each. The heirs of Stillman A. Gleason, the son of the testator, did not take by inheritance from the testator but took as donees, that is, by purchase, and yet the Supreme Court of Massachusetts in that case, as well as in many others, went to the statute, not only to determine who the heirs were, but also the share and portion taken by each.

In *Holbrook* v. *Harrington et al.*, 16 Gray, 102 (Mass.), the Supreme Court of Massachusetts said:

> "A devise to heirs, whether it be to one's own heirs or to the *heirs of a third person*, designates not only the persons who are to take, but also the manner and proportions in which they are to take; and when there are no words to control the presumption to the will of the testator, the law presumes his intention to be that they shall take as heirs would take by the rules of descent."

In *Rand* v. *Sanger*, 115 Mass. 128, the court said:

> "The devise to heirs designates not only the persons who are to take, but also the *manner* and portions in which they take. Where there are no words to control, the law presumes the intention of the testator to be that they shall take as heirs would by the rules of descent. In the case at bar it does not sufficiently appear from the terms of the will that it was the intention to use the words '*my legal heirs*' in any other than a strict legal sense, and the rule must

be held to apply in determining who are to take. The general rule must also apply in determining the *proportions* in which the heirs shall take."

The Supreme Court of Pennsylvania in a large number of cases held that a devise to the heirs of the testator or to the heirs of a third person refers to the law of descent and distribution to determine two things: *First,* who the heirs are; and, *second,* the quantity and proportion of the estate taken by them. In *Baskin's Appeal,* 3rd Pa. St. Rep. 304, the court had under consideration a will wherein the testator directed: "Then my will is, that the remaining part of my goods, stock, etc., shall be impartially appraised, and after such appraisement is made, the same shall be equally divided between all the heirs." The court says:

> "We are of the opinion that the testator has reference to the *intestate* laws, by which his estate will be divided among his children and grandchildren *per stirpes.* After making certain bequests, he directs the remainder of his goods, stock, etc., to be appraised and equally divided among the heirs. By these expressions, he meant, his own heirs, which can only be ascertained by resorting to the statutes of distribution, as has often been done in analogous cases; and, taking this to be the rule, it descends to the children and grandchildren *per stirpes.* This shows the persons *who are to take,* and the same rule must be applied to *quantum* of the estate."

In *Minter's Appeal*, 40 Pa. St. 114, the court had under consideration a will wherein the testator says:

> "The balance and residue of my estate I order and direct my executors to divide equally, share and share alike, amongst the children of my brother, Adam Minter, deceased, and the children of my brother Martin G. Minter, and to my sister, Barbara Savol. It is my will that said Barbara and the children of said brothers, Adam Minter and Martin G. Minter, shall have the residue of my estate, share and share alike."

The testator died 1858 unmarried and without issue, leaving two children of his brother Adam and fourteen children of his brother Martin G. Minter, and two children of his sister, Barbara Savol, who had died about eight years before the date of the will. There were others, nephews and nieces, the children of his deceased brothers, Michael and Henry, to one of whom he gave a legacy of $210. The legacy to Barbara Savol would have lapsed except for a statute passed by the legislature of Pennsylvania in 1844, which saved the bequest to the testator's sister, Barbara Savol from being void, though she had died before the will was written, leaving children surviving the testator. The court said in passing on this case in regard to what estate the heirs of Barbara Savol would take:

> "When we find a man distributing his estate, in whole or in part, among his next of kin, and he leaves the proportions in which they are to take doubtful, it is quite natural for us to

suppose that he had the statutory or customary form of distribution in his mind, and to interpret his will accordingly. This would classify the legatees as he seems to have done, and as the court below did, and allow the *three classes* to take as their parents would have done; thus, they, themselves, take by *quasi* representation and *per stirpes.*"

The court held that the children of Barbara Savol took the share she would have taken if she had been living at the date of the death of the testator and had died intestate.

In *Dunlap's Appeal*, 9th Atl. Rep. 936 (Pa.), the court said:

> "Where a man gives the whole or a part of his estate to his next of kin and leaves the proportions doubtful, it is natural to suppose that he had the statutory form of distribution in mind, and to interpret his will accordingly."

A large number of Pennsylvania cases have held that where the proportion is doubtful under the terms of the will the intestate laws will govern:

Sheetz Appeal, 82 Pa. St. 213;
Lipman's Appeal, 30 Pa. St. 180;
France's Estate, 75 Pa. St. 220;
Fissel's Appeal, 27 Pa. St. 55.

The Supreme Court of South Carolina, in Third Richardson's Equity, 543 (55 Am. Decisions 646), discussed at length a devise or bequest to *heirs* or heirs at law. This opinion is worthy of diligent consideration, inasmuch as it discusses the English and

American decisions on the question and overrules some former decisions of the courts of South Carolina. Believing that the court will read this discussion in full, we will not quote very extensively from it. Among other things, however, the court said:

> "Whatever may be the doctrine of the English cases on this subject, the state of our law and of *public policy* justify the rule that whenever we are compelled by the terms of description in a devise or grant, to resort to our statute of distributions for the purpose of ascertaining the objects of the gift, *we must also resort to the statute to ascertain the proportions in which the donees shall take, unless the instrument making the gift indicates the intention of the donor that a different rule of distribution shall be pursued.*"

The court further said:

> "In the case under consideration the Court of Appeals in equity could not have attained the conclusion that the 'heirs of the body' of the tenant for life took as purchasers, within the rules as to the remoteness of limitation, otherwise than by construing these terms to mean the descendants of the tenant for life living at the time of her death, or something equivalent. No one can take as heir of the body of another unless he fulfills the description, and is not only such a person as would take the real estate of that other under our act of distributions, but likewise a lineal descendant. As we are obliged then, to ascertain from the statute of distributions *who are the heirs of the body*, it is a logical consequence that we should look there also to

ascertain their share in the subject of gift. The statute is the exponent of the full meaning of the donor, unless he has declared a contrary intent, which is not pretended in the case before us."

In discussing whether heirs taking by purchase or as donees, take the shares and portions fixed by the statute, as we insist in this case, the court said:

> "It was strongly insisted in the argument of this case, that whenever several persons took as purchasers under one gift they must take *per capita,* and that no case could be found to the contrary. But where is the necessary connection between the ideas of *purchase and equality?* Surely a testator might provide for an unequal distribution among those taking by purchase; as by a gift to A and the three children of B, so that A should take one-half, or by a gift to C for life, and upon his death to his children then living, the eldest son of C taking one-half, however numerous such children may be. It is useless however, to suppose cases when examples may be found in books. In 2 Jarm. on Wills, 40, it is said:
>
> > 'The statute of distribution not only determines the object of a gift to "relations," but also regulates the proportions which they take, the gift being held to apply to the next of kin and the persons whom the statute admits by representation, the whole being taken *per stirpes* not *per capita;* that is, the property is distributable proportionately among the stocks, not equally among the several individual objects of every degree'."

The Supreme Court of South Carolina in a much later case decided in 1892, *Dukes* v. *Faulk*, 37 S. C. 255 (34 Am. St. Reports, 745), discussed the question as to what method of distribution or division should be made among a class taking as purchasers, where the devise was to the legal heir or heirs of the body, or kindred phrases, and expressly held that where it was necessary to look to the statute to determine who the heirs were, it was also necessary to look to the statute to determine the portions in which they should take.

The court said:

> "If, therefore, the gift is to a class of persons designated as heirs of a particular person, then, as it is necessary to resort to the statute to ascertain who are the individuals composing the class, resort must also be had to the statute to determine how or in what proportions such individuals shall take. This is upon the presumption that the donor, having by implication, at least, referred to the statute as to the persons who were to take, also intended that reference should be had to the statute to determine the proportion in which they should take, unless he expressed a different intention."

The court in this case quotes from *Campbell* v. *Wiggins*, Rice Equity 10, and other South Carolina decisions, and says that decision was much shaken in *Templeton* v. *Walker*, 55 Am. Decisions 646, and in effect overruled. In *Campbell* v. *Wiggins*, Rice Equity 10, the chancellor had under consideration

the question of what share goes to each heir under an Act of the Legislature granting certain land to the heirs of Wiggins, deceased, and held that as the heirs took by purchase they took equally, but that decision was overruled in the later cases cited above. See also:

Lott v. *Thompson*, 15 S. E. Rep. 278 (S. C.).

The Supreme Court of Connecticut, in 1897, held that a bequest to the heirs of testator's niece, who died before the testator, was a class gift, which on the death of the testator vested in the descendants of the deceased niece *per stirpes.*

—*Ruggles* v. *Randall*, 38 Atl. Rep. 885.

The Supreme Court of Tennessee in 1898 had under consideration a will containing the following clause:

> "I give and bequeath to my beloved wife, Ollie C. Reese, a certain tract or parcel of land containing, by estimation, about 120 acres, and bounded as follows: * * * To have and to hold as long as she lives, at her death the said land is to be divided between my *heirs at law.*"

The court said:

> "This is an explicit devise of the land to the widow during her life, with the remainder in fee to the heirs at law of the testator. The chancellor treated the remainder as vested, but the Court of Chancery Appeals was of the opinion that it was contingent. We concur in the latter view. The remainder was contingent, because the testator obviously intended the land to be

divided *at the death of his widow* among such persons as should then sustain to him the relation of heirs at law. The remainder-men are to be ascertained, not at his death, but at the death of his widow, the life tenant; *and they are to be such persons as should at that time be his heirs at law.*"

The court further said:

"In what proportion do the remainder-men, when ascertained, take the land? The chancellor held that they take *per stirpes,* according to the statute of descent; and the Court of Chancery Appeals held that they take *per capita,* share and share alike. On this question we concur in the holding of the chancellor. When the testator directed that the land should be divided among his heirs at law, he meant that the persons falling within the description should take *as heirs at law would take.* The phrase *heirs at law* indicates who shall take, and *how they shall take.*"

—*Forest et al.* v. *Porch et al.,* 45 S. W. Rep. 676.

The Supreme Court of Michigan had under consideration a will providing for a life estate free from taxes, to be held by the testator's widow, in land to be paid for out of his other estate, and also gave her an annuity payable regularly after his decease, and made all of his other property, real and personal, subject to disposal, if necessary, to meet that and other charges; and then, after providing for certain other persons, left the "residue of his estate to *de-*

scend to his lawful heirs according to law." The court held that leaving it to descend to his lawful heirs according to law means simply,

> "that the heirs who appear to have been in different degrees of consanguinity should take their *shares* in the order of representation prescribed by the statute."
>
> —*Bailey* v. *Bailey*, 25 Mich. 185.

The Supreme Court of Illinois had under consideration the following clause in a will: "I give, devise and bequeath to my heirs at law the remainder of my estate." The court said in construing this:

> "We must invoke the aid of the statute to determine the persons who constitute the class. When invoked to determine the persons to take, we must follow its provisions as to the *quantity* they shall take."

The court said further:

> "The persons to take, and the proportions, must be determined by the statute of distribution."
>
> —*Richards* v. *Miller*, 62 Ill. 417-426.

The Supreme Court of Iowa had under consideration a will containing the following clause:

> "It is my will that at the death of my brothers, Isaac J. Lester and Garra Kimball Lester, that my entire estate, both real and personal, be divided between my heirs at law."

The court, among other things, said:

"The court is of opinion that, according to the established rule of law, a devise to heirs, whether it be to one's own heirs or to the heirs of a third person, designates, not only the persons who are to take, but also the *manner* and *portions* in which they are to take, and that when there are no words to control the presumption of the will of the testator, the law presumes his intention to be that they shall take as heirs would take by the rules of descent."

—*Johnson* v. *Bodine*, 79 N. W. Rep. 348.

The Indiana cases are in line with this holding. See:

Henry v. *Thomas*, 20 N. E. 519;
Wood v. *Robertson*, 15 N. E. 457.

The Supreme Court of Indiana in these two cases cite and approve the Massachusetts and Pennsylvania cases, and also the New York cases, which will be hereafter mentioned.

The Court of Appeals of New York has had this question under consideration, and in cases which we believe are not only well considered, but absolutely in point. In one case that court had under consideration a will wherein the testator who left surviving him only his wife and collateral relatives, gave to his wife one-half of the income of all of his property for and during her life "without restraint, deduction or interference of any kind," and gave the "remaining of the income accruing during her life,

after payment and discharge of all taxes, assessments and charges, and the reversion after the death of his wife, to his *legal heirs.*"

The court said:

"The remainder was devised and *bequeathed to his legal heirs,* but in the manner and under conditions manifesting a very decided purpose to *postpone* their estate in remainder until the death of his wife."

The court further said:

"We are thus required to determine who the testator meant by *legal heirs,* and whether he intended to designate by that phrase the individuals merely who should take, or to fix also the *quantity of estate* which should devolve upon each. If he used the words legal heirs solely to identify individuals who were to take as devisees, they would be deemed in general to take as purchasers, *as if all had been named,* and in the absence of any modifying language of the will, would take as tenants in common and *per capita. That, of course, assumes that the interest devised is in some way different from that which would have descended had no will been made.* But the testator, I think, himself indicated the sense in which he used the phrase, and what he meant by it. Where he declares the consequences of the forfeiture of any share, he uses this language: 'The share that would otherwise have gone to him or her shall be divided among the remaining heirs according to law.' This undoubtedly means according to the law which governs in a *case of intestacy.* It evidently respects the *quantity of interest,* as well

as the persons who are to take; for the division —that is, the proportion—is to *be according to law.* This language tends to explain the meaning of the testator in the use of the word heirs in the devise of the remainder. It is qualified by the word legal, which seems to have been used in the same sense and to express the same idea as the phrase *according to law.*"

The court then held that the remainder-men should take as in case of intestacy, and so *per stirpes.*

—*Woodward* v. *James*, 22 N. E. Rep. 150.

It is well here to return to sections 6 and 7 of the Supplemental Agreement, putting in force the Arkansas law, and again note the language, wherein the statute says:

"And the descent and distribution of land and money provided for by said act shall be *in accordance* with chapter 49 of Mansfield's Digest."

And in section 7, where the statute says:

"And if any such child has died since May 25, 1901, or may hereafter die, before receiving his allotment of lands and distributive share of the funds of the tribe, the land and moneys to which he would be entitled, if living, shall descend to his heirs as *herein provided,* and be allotted and *distributed to them accordingly.*"

In *Lawton et al.* v. *Corliss,* 27 N. E. 847, the Court of Appeals of New York had under consideration a will containing the following clause:

"I order and direct that my estate be divided among my heirs at law *in accordance with* the laws of the state of *New York,* applicable to persons who die intestate, and that no bond or security whatever be required of my executors hereinafter named in the settlement of my estate, real or personal."

It will be noticed that the language of this will is almost identical with a part of the language of the Supplemental Agreement wherein it says:

"Divided among my heirs at law in accordance with the laws of the State of New York."

The Supplemental Agreement says:

"The descent and distribution of lands and moneys provided for by said act shall be *in accordance with* chapter 49 of Mansfield's Digest."

In considering this will the court said:

"The use of the words heirs at law in such a connection indicates, as I think, the legal heirs, in the sense of persons who would legally succeed to the property in case of intestacy, according to its nature or quality, the heirs at law taking the realty and the next of kin the personalty. The cardinal idea seems to be that the division should be in accordance with the statute in case of intestacy. This, as was said by the general learned term, seems to be the plain import of the language used by the testator, giving to the persons forming each of these classes whatever of the estate would go to them under the laws of the state. As already suggested, there is nothing to indicate any other

purpose. It is precisely as if the testator said: 'I do not intend that there shall be any dispute over my estate. I mean to declare that the persons who are recognized by the law of the State of New York as entitled to a portion of it shall have it to the *extent* that the law declares. My *real estate* shall be divided among those to whom it would descend, and my personal estate shall be divided between those who would be entitled to it, just as if no will had been made, and I make this will only for the purpose of securing the co-operation of the executors "whom I have named to take charge of my estate and protect it".' This construction is in conflict with no decision of this court to which our attention has been called, and is in accordance with the recent case of *Woodward* v. *James*, 22 N. E. Rep. 150, which we regard as controlling."

The court discussed the meaning of the words *according to law* and held that under the will those denominated by the statute as his heirs would take the real estate in the proportions prescribed by the statute just as if the deceased had died intestate—that is, they took *per stirpes*, and not *per capita*.

We believe these authorities are in point and furnish the correct rule of construction to be applied to Sections 6 and 7 of the Supplemental Agreement, putting in force Chapter 49 of Mansfield's Digest of the Statutes of Arkansas on descent and distribution. The lawmakers never intended to make any distinction between the heirs and their proportionate shares where the allotment was set apart to the heirs

after the death of the citizen, and the heirs taking by strict and technical inheritance the allotment of a deceased citizen who had received his allotment before his death. As heretofore pointed out, an equitable equalization in the allotment and distribution of the lands of the tribes was the guiding star. If we are to look to the statute of descent merely to determine who the heirs are in those cases where the heirs take by purchase, and not look to the statute of descent and distribution to ascertain their proportions and shares, then those heirs taking an allotment as donees, and not by strict and technical inheritance, would receive and obtain a different estate and a different share of the tribal lands than heirs taking strictly by inheritance. No distinction was ever intended, and we do not believe it would be just and equitable for the court to, by any fiction of law and construction, differentiate between the rights, equities, shares and proportions of heirs of Andrew J. Berryhill, had he received his allotment during his lifetime and died seized and possessed of the same.

As said by the Commission to the Five Civilized Tribes in their annual reports, heretofore referred to, the lands and moneys of the Creek Nation constituted a vast and valuable estate to be administered upon and allotted and distributed to the beneficiaries named in the original and supplemental treaties.

Point Two.

In applying the Arkansas Law of descent the land in question should be treated and considered as an ancestral estate coming from the paternal side, and, therefore, inherited by the father under section 2531 of Mansfield's Digest.

The Arkansas law of descent can not be made to fit with technical precision the descent of an Indian allotment. If the contention of plaintiff in error prevails it will be difficult to obtain a title to inherited lands in the Five Tribes, because if the allotment is treated as a new acquisition the father will have a life-estate and then at his death the mother gets a life-estate, with the fee passing to collateral kindred, uncles, aunts, cousins and other remote relatives according to their proximity to the deceased, and the court will see at a glance that such a condition ought not to exist. It complicates titles, whereas, the construction contended for by us narrows the line of descent to those most equitably entitled, the father and mother. Besides, in the Five Tribes, on account of the lax marriage relations of the members, it is not easy by any means to ascertain who are the collateral kindred, and no man knows when he has all the heirs, and as a consequence of this uncertainty, no one will pay anything like the real value for the land if the allotment is to be treated as a new acquisition and pass in fee to collateral kindred with a life-estate first to the

father, and, second, to the mother, as contended for by plaintiff in error.

The decisions of the Supreme Court of Arkansas show that in the absence of *descendants,* it becomes material to determine first: The source from whence the estate came before the heirs in the *ascending* line can be nominated, and their shares and portions fixed and determined. In other words, the Supreme Court of Arkansas has expressly decided in numerous decisions that the father and mother are not heirs—that is, they cannot take real estate under section 1 of the chapter, unless the estate is *either ancestral or a new acquisition.* Although the estate may be ancestral the father is not an heir unless the estate came to the deceased from the father's side—that is, unless "the estate come by the father," or from the father's side of the house. If the estate came by the mother, the father took absolutely no estate by inheritance. If the estate was a new acquistion, only a life estate. So far as the personal property is concerned, it is immaterial from whence the property was derived or from what source it came to the deceased. But it is different with real property; it is immaterial, insofar as real property is concerned, as long only as there are *descendants,* but in the absence of *descendants* it becomes necessary to determine the source from which the estate came to the deceased.

Let us first examine the celebrated case of *Kelly* v. *McGuire,* 15 Ark. 582.

In discussing section 1, out of which we contend the father is carved as an heir by section 10, the Supreme Court of that state said:

> "The first section is general and comprehensive, embracing all lands, whether ancestral or newly acquired, *subject to certain exceptions and qualifications*, hereafter more particularly noticed, and these exceptions refer to *real estate alone*. This section also constitutes the table, by which real estate is to descend and personal property to be distributed. As, by its express language, it relates to both real and personal property, it was manifestly the design of the legislature, when there were *descendants* of the intestate, to send down both to them *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, without any regard to the fact as to *how the property has been acquired.*"

We wish to impress upon the court the importance of preserving this distinction—that is, the fact as to how the property had been acquired is not material as long as there are *descendants* to take the estate; otherwise when we turn to the *ascending* line.

The court in this decision further said in this same connection:

> "And as to personal property, where there are no descendants of the intestate to distribute it to, *collaterals* will take in the same way as *descendants*, if there had been any; that is to say, without any inquiry as to how it was acquired, and, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree. This was manifestly the design of the legislature. The sec-

tions of the statute which have reference to both real and personal property, and expressly name or allude to both, or embrace them in their spirit, are the first, fourth, fifth, fifteenth, sixteenth, seventeenth and eighteenth. The fifteenth, sixteenth, seventeenth and eighteenth touch the subject of advancement. And, to attain the object in view, it was necessary to blend real and personal property together; because the amount received is the inquiry; and, whether in land or personal property, produces the same result."

The court further said:

"The effect of the first section is, to constitute the persons, who take the personal property, whether *per capita*, or *per stirpes*, and whether of the *whole* or *half*-blood, the absolute owners. Nor is it *material*, whether those persons are the paternal or maternal, or the lineal or collateral line. By that section, as already remarked, real and personal estate goes in the same channel, and *if no subsequent provisions had been* introduced touching *real estate*, the precise bearing of which, it is probable the revisers did not perceive, our labors would have been comparatively easy. At present, nothing further need be said as to personal property, as we shall find it necessary to allude to that hereafter, and shall now speak in reference to real estate."

The court then goes ahead to explain and carve out the exceptions and qualifications in the following language:

"The effect of the first section, subject to

the *exceptions* and *qualifications* alluded to, is to vest an absolute estate of inheritance in lands in the person who takes. And every estate, interest and right, legal and equitable, in lands and tenements and hereditaments, excepting only leases for years, and estates for the life of another person, are thus inheritable and descendible; or, as the first section expresses it, 'having title to any real estate of inheritance,' constitutes an inheritable estate, thus abolishing the common law doctrine, derived from feudal times, of actual seizin in the ancestor."

Further:

"We pass now to the more particular consideration of the tenth section. The manifest intention of the first part of this section, was to preserve ancestral estates in the line of the blood from whence they came. It was a partial adoption or recognition of the common law principle, which invariably followed the line of the blood. If the estate comes to the intestate by the father, or as it may be differently, and as well expressed, on the part of the father, then it must ascend to the father and his heirs, and thus overturning the inflexible rule of the common law, that an estate could never ascend; but should rather escheat to the lord. And so, if it comes by or on the part of the mother, it goes to the mother and her heirs in exclusion of the heirs of the father. In other words, it remains in the paternal or maternal lines, from whence it was derived."

The court then says:

"The tenth and twenty-second sections must be construed together, although the exact expres-

sions used in the latter, are not contained in any part of the statute. But words of equivalent signification are employed, and they are embraced within the spirit of the twenty-second section. The expression, then '*come by the father or mother,' is not limited to an estate acquired by descent merely,* but includes an estate which comes to the intestate by gift, devise or descent from the parent referred to, or from any relation of the blood of such parent. Such is the letter and spirit of the statute. In other words, there are two classes of cases provided for: One where the blood of the person, from whom the descent came, whether it be by descent, devise or gift, is *regarded;* and the other, where the blood of the intestate forms the *stirps,* or stock of descent, without respect to ancestral blood.

Chancellor Kent says there is a difference in the laws of the several states, between the succession to estates, which the intestate had acquired in the course of descent or by purchase. 'If the inheritance,' says he, 'was ancestral, and came to the intestate by gift, devise or descent, it passes to the kindred, who are of the blood of the ancestor from whom it came, whether in the paternal or maternal line'."

Insofar as the personal property is concerned, whether it was a new acquisition or ancestral, is entirely immaterial. In further discussing the question of what estate the father would take, the court in this celebrated case said:

"The portion of section 10, as to *new acquisitions,* gives the father and mother a life estate only, with the remainder to the collateral heirs of the intestate; such as brothers and sis-

ters and their descendants, and so on. A new acquisition, or newly acquired estate, does not afford, of itself, an exact idea of the mode of acquisition. By the common law, there were two modes of acquiring an estate—distinguished by the general appellations of descent and purchase. In the first, it was by operation of law; in the second, by act or agreement of parties. Devises and gifts fall in the latter class. An estate by purchase there became inheritable to the heirs general of the purchaser, first of the paternal, and then of the maternal line.

"It must be understood, however, that a new acquisition, in the sense intended by the statute, is one which the intestate has acquired by his exertions and industry, or by will or *deed from a stranger. In other words, it is an estate derived from any source other than descent, devise or gift, from father or mother or any relative in the paternal or maternal line.*

"If the son should purchase land from the father or mother, for a valuable consideration, it would be a new acquisition, and descend as such; because nothing is received by way of *bounty* at the hands of ancestors, which is the case as to lands descended from, or devised, and it was thought reasonable that they should remain in the blood from which they came.

"Land is to be considered as having come from, or by, or on the part of, the father or mother, when it comes by gift, devise or descent, either mediately or immediately from them or from any person in their respective lines."

After having fully reviewed the statutes, the court says:

"Our statute provides for ancestral and newly acquired inheritances."

It then epitomizes the statute in the following paragraphs, numbering each:

"*First.* That, as to both real and personal property it was the design of the legislature, when there were *descendants* of the intestate, to send down both to them, *per capita*, if in equal degree, and *per stirpes*, if in an unequal degree, without regard to the fact as to how the estate was acquired.

"*Second.* That, as to *personal property*, it was the design, where there were no descendants, that it should go to collaterals in the same way it would have gone to descendants, if there had been any; that is to say, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree and without inquiry as to how the property was acquired by the intestate.

"*Third.* That as to real estate, it was the design of the legislature, where there were *no descendants*, to point out the lines of the succession, *and that this is to depend on the fact, whether the inheritance is ancestral or new;* and, if ancestral, then whether it come from the paternal or maternal line.

"*Fourth.* If the inheritance was ancestral, and come from the father's side, then it will go to the line on the part of the father, from whence it came, not in postponement, but in exclusion, of the mother's line; and so on the other hand, if it come from the mother's side, then to the line on the part of the mother, from whence it came, to the exclusion of the father's line.

"*Fifth.* If the inheritance be not ancestral, but a new acquisition, then, after a life estate, reserved in succession to the father and mother, if alive, it will go in remainder, first to the line of the intestate's paternal uncles and aunts, and their descendants, in postponement of the mother's line, until the former becomes extinct; and then to the line of the intestate's maternal uncles and aunts, and their descendants; unless there should be kindred, lineal or collateral, who, either in right of propinquity, or by right of representation, stand in a nearer relation to the intestate than the uncles and aunts; in which case, such nearer kindred would take the inheritance to the exclusion of both of these collateral lines; and, in their hands, it would become an ancestral estate, and always go in the blood of the relative from whence it came, in the ordinary course of descent prescribed for ancestral inheritances.

"*Sixth.* That, when the inheritance is fixed, by these facts, *in any given line, it will pursue that line until it becomes extinct,* and the objects of bounty, and the order in which they succeed one another, and the proportion they take, are to be ascertained by the first section, which is to be considered as the general table of descent. The father, mother, brothers, sisters, and so on, mentioned in that section, are those who are to be considered when counting from any propositus, whether the propositus of a single line only, or the concurrent propositus of both lines, as the intestate, is *as to personal property.*

"*Seventh.* In all cases where the inheritance is in any one line, if there goes in succes-

sion, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, precisely as if the other line was extinct, and precisely as the inheritance of a bastard would take a course in his mother's line, he having no father's line at all.

"*Eighth.* The half-blood and their descendants take personalty, as well as realty, equally with the whole-blood, except that they are excluded from real estate when ancestral, if they lack the blood of the transmitting ancestor."

We call especial attention to the third paragraph wherein the court clearly and expressly says:

"That as to real estate, it was the design of the legislature, where there were no *descendants*, to point out the lines of succession, and that this is to *depend* on the fact, whether the inheritance is *ancestral* or *new;* and, if ancestral, then whether it come from the paternal or maternal line."

In *Shulthis* v. *McDougal*, 170 Fed. 529, the United States Circuit Court of Appeals for the Eighth Circuit carefully considered this question, and held that while the Arkansas Statute made provision for the descent of property for the civilized white community whose estates it was intended to govern, yet, as applied to the Indians of the Five Tribes it was somewhat inappropriate in its application. The court said:

"It needs but a moment's thought to see that, when this statute was applied to the lands of the Creek Nation, it was applied to a subject

matter entirely different from that which was in the mind of the Legislature of Arkansas. The lands of that tribe fit into neither of the classes mentioned in the statute (reference being to ancestral estates and new acquisitions.) They did not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase. In applying the statute in this case, therefore, we shall have to proceed by analogy only. The tribal lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the nation. They constituted the home or seat of the tribe. Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property. It was granted to the tribe by the federal government not only as the home of the tribe, but as a home for each of the members. From the time they took up their residence west of the Mississippi, the Constitutions of the Five Nations provided that their land should remain 'common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them.' The term 'improvements,' as here used, meant not only betterments, but occupancy. *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 210, 15 Sup. Ct. 55, 39 L. ed. 120. These 'improvements' passed from father to son, and were the subject of sale, with the single restriction that they should not be sold to the United States, individual states, or to individual citizens thereof. Under such

regulations the members of the Creek Nation had been in possession of homes on their tribal lands for more than half a century. The portion of their lands which were not occupied in severalty, as well as the tribal funds, were treated as belonging to the members, and all income derived therefrom was distributed among them per capita. While the legal title to the tribal property belonged to the tribe as a political society, the beneficial use of the same had at all times belonged to the members in severalty. It was to such a condition of life and property as this that the plan of allotment here involved was to be applied. Its controlling principle is a clear recognition that each member of the tribe, by virtue of his membership, was entitled to an equal share in all the tribal property. To carry out the scheme, the law first proceeds on the one hand to ascertain the membership of the tribe, and on the other the actual present value of its property, and then directs that the tribal property be divided per capita so that each member shall receive an equal share thereof, according to its true value. The right to such a share is not created by the statutes, but is simply recognized and enforced by them. The several agreements and Acts of Congress are not concerned with the legal title, but go back to the actual beneficial rights of property as they had always existed in Indian Territory. They require allotments to be made so as to save to each member his improvements, including his right of occupancy. *While the tribe in carrying out the project grants the legal title to the property, it does not confer the right to that property.* The act by which the distribution is made is spoken of *not as a grant, but as an allotment.*

We are not departing from the well-established doctrine of the Supreme Court that the lands of these Indians belong to them as a political society and not to the individual members. *Cherokee Trust Funds,* 117 U. S. 288, 308, 6 Sup. Ct. 718, 29 L. ed. 880; *Delaware Indians* v. *Cherokee Indians,* 193 U. S. 127, 24 Sup. Ct. 342, 48 L. ed. 646. So long as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private, separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property *was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner.* Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. *The right of the property antedates the allotment,* and is simply given effect to by that act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe. *It was his birthright. It came to him by the blood of his tribal parent, and not by purchase.* In applying the Arkansas statute, we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands not as a new acquisition by him, but as an inheritance from his parents as members of the tribe. His father was the only parent through whom he derived his right, and to the father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the par-

ents equally. From this premise it necessarily follows that George Franklin Berryhill succeeded to the entire estate of the property in question."

The above reasoning of the Court of Appeals is sound, and based on well settled principles of Indian laws. Not being able to add anything new to the reasoning of the Court of Appeals we confine ourselves to supporting the reasoning of the court.

Under the fourteenth article of the treaty of March 24, 1832 (7 Stat. 366), the third article of the treaty of February 14, 1833 (7 Stat. 417), by the letters patent issued to the Creek Nation on the 11th day of August, 1852, and the third article of the treaty of August 7, 1856 (11 Stat. 699), the lands of the Creek Nation situated in Indian Territory were held by them as a tribe in fee simple so long as they should exist as a nation and continue to occupy the lands.

The Court of Appeals in the *Shulthis* case recognized the doctrine announced in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Delaware Indians* v. *United States*, 193 U. S. 129; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Ligon* v. *Johnson*, 164 Fed. 670; and *Fleming* v. *McCurtain*, 215 U. S. 56; all of said decisions holding that the title was in the tribe as a political entity and not in the individual members or citizens of the tribe. While that is true, the *right of occupancy was in the individual citizens and enjoyed by them in severalty.* The tribe as a polit-

ical entity possessed the title, or rather possessed a base fee, as stated by opposing counsel. Nevertheless, the use and occupancy of the tribal domain was held and enjoyed in severalty, and that part of the tribal domain occupied by a citizen constituting his home, was descendible to his heirs, and when thus segregated from common occupancy, constituted a right as sacred as the fee simple absolute title of the whites.

The Creek Nation had a written Constitution providing for a republican form of government to be conducted under the three co-ordinate branches, to-wit: the legislative, executive and judicial.

The National Council of the Creek Nation, by an act duly approved October 11th, 1893 (Acts and Resolution of the National Council of the Muskogee Nation, 1900, page 5), under the head (Fence—Lawful Farm) prescribed that a lawful rail fence shall be seven rails high, well staked and double ridered; a straight fence so and so; a lawful wire fence shall be eight wires, etc.; and section 14 provides that:

> "When any citizen shall have a lawful fence as defined in this act, and the stock or property of another citizen shall damage or injure his crops, he shall be entitled to damages for such injury, which shall be assessed by two disinterested persons, said persons to be appointed by the judge of the district wherein said damage is done."

And section 15 provided that:

> "No citizen not having a lawful fence shall

be entitled to damages done to his crops by the stock of another."

In the Constitution and Laws of the Creek Nation of 1893 (McKellop), duly printed and published, certain exemptions from levy and sale under execution are provided for, and section 254 makes it unlawful "to levy upon and sell, under any execution or decree of any court, any improvement upon the public lands to satisfy any debt by contract."

In the Constitution and Laws of the Muskogee Nation, 1893, by McKellop, page 57, will be found the following section, under the caption, "Vacated Places," to-wit:

> "Section 147. *Places which have been vacated, without fencing or houses, for the term of five years, shall be liable to settlement and improvement by any person, and any one who may settle upon such places shall have all the rights to them as if they had never been occupied before.*"

Likewise, on page 94 of the Constitution and Laws of the Muskogee Nation, 1893, by McKellop, under the head of "Wills and Administration," we find the following section, to-wit:

> "The *homestead* and kitchen furniture, one work horse, one cow and calf, and one breeding sow, shall be exempt from seizure or force sale for any debt against the estate."

The section just preceding the above quoted section, provides that:

"The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate if there are no children, and a child's part, if there should be children, in all cases where there is no will. The husband surviving shall inherit of the deceased wife in like manner."

Section 333, on page 115 of the same Laws and Constitution of the Muskogee Nation, provided that any citizen,

"head of a family, engaged in the keeping or grazing of livestock in this nation, shall for that purpose be entitled to enclose for his exclusive use, free from any manner of tax, one mile square of the lands of the public domain; but such enclosure shall not intrude on the rights of any other citizen without his or her consent."

These sections of the Creek published laws preserve to the heirs of the deceased occupant the homestead, and make it free from seizure or force sale for any debt against the estate.

The Eighth Circuit Court of Appeals in *Davison* v. *Gibson,* 56 Fed. 443, had before it a case involving the descent of a forty-acre farm improved and in the possession of a Creek freedwoman. It does not appear from the statement of that case, and the opinion of the court, that anybody contended that the forty-acre farm although not allotted reverted to the tribe upon the death of the occupant.

Indian title by occupancy before allotment was sufficient title on which to base ejectment.

—*Hockett* v. *Alston*, 58 S. W. Rep. 675;
James v. *Smith*, 58 S. W. Rep. 715;
Hockett v. *Alston*, 110 Fed. 910;
Wilson v. *Owens*, 86 Fed. 572.

That the right of occupancy descended, see *Rush* v. *Thompson*, 53 S. W. 333, and *Nivens* v. *Nivens*, 64 S. W. 604, all Indian Territory cases.

The nation had a duly authorized Supreme Court provided for by its constitution. The records of that court are in the custody of the federal government, and in the archives of the Interior Department.

That court had before it, in 1880, '81 and '85 (justice proceeded slowly in the Creek Nation as well as other courts), the case where one Ann Rogers, a Creek citizen, was the owner of a certain farm at the date of her death; she left a non-citizen husband, and the case involved the question as to whether or not the brothers and sisters of the deceased, Ann Rogers, were entitled to the property, or the non-citizen husband. Quite an elaborate written opinion was filed by the Supreme Court of the Creek Nation in that case, and among other things the court said:

> "It is also shown that John T. Rogers, in his answer to the allegations by the petitioners before said John Q. Tufts, United States Indian Agent, stated that the place on which Mrs. Rogers lived was the property of herself, and no

one else. This he failed to substantiate by evidence, for the property was made the property of William Fisher. From this it is evident that the said Rogers was in this matter actuated by unseen and unlawful motives."

In the appendix to this brief, the court will find decisions of the Supreme Court of the Creek Nation clearly showing that Creek citizens had the right to inclose a part of the public domain, improve the same, and on their death, the right to the possession of the inclosure and the improvements thereon, passed to the heirs.

Strictly speaking, an allottee was not a grantee or purchaser or donee. The word "allot" itself signifies a partition among those holding an interest in common. Thus, in *Minnesota* v. *Hitchcock,* 185 U. S. 396, this court said:

> "As said in *Worcester* v. *Georgia,* 6 Pet. 515, 582, 8 L. ed. 483, 508:
>
> > 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. *To contend that the word "allotted," in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged,* would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this

> unlettered people, rather than their critical meaning, should form the rule of construction'."

Says Chief Justice MARSHALL, in *Johnson* v. *McIntosh*, 8 Wheat. 543, 603, 5 L. ed. 681:

> "It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right."

So, in *United States* v. *Cook*, 19 Wall. 591, 593, 22 L. ed. 210, the court, speaking through Mr. Chief Justice WAITE, says:

> "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy."

Yet later, in *Beecher* v. *Wetherby*, 95 U. S. 517, 525, 24 L. ed. 440, the court says:

> "But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians. That occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."

An allotment is not a donation, and the title of the allottee is not a new acquisition. His right antedates the allotment, and herein lies the difference between the status of the tribal domain and the public lands of the United States. As pointed out the tribal domain was occupied by the citizens in severalty, whereas, the public lands of the United States are not occupied by the citizens, but on the other hand the occupancy of the public lands of the United States is made a crime by Federal Statute (23 St. L. 321, 6th Fed. St. Ann. p. 533), unless the claim is made "in good faith with a view to entry thereof at the public land office under the general laws of the United States at the time any such enclosure was or shall be made." The Creeks had no land office as a tribal institution. The citizens of the Five Tribes occupied the land in severalty, and the Arkansas cases holding that a title acquired to public lands of the state or United States is a new acquisition are not in point. The doctrine of the Eighth Circuit Court of Appeals in the *Shulthis* case, *supra,* is fully supported by the decision of the United States Circuit Court of Appeals for the Ninth Circuit, in *Beam* v. *United States,* 162 Fed. 260. In the *Beam* case the court had under consideration the general allotment act of '87 and the effect of that act, and in speaking of the title of the individual allottee the Court of Appeals said:

> ***"The Indians were not donees of the government, and the allotment was not made as a***

mere act of its bounty. It was an act of partition in severalty to individual Indians of lands the title to which the United States then and for many years had held in trust for the tribe."

And, again, in *Spalding* v. *Chandler*, 160 U. S. 394, 402, 16 Sup. Ct. 360, 364, 40 L. ed. 469:

> "It has been settled by repeated adjudications of this court that the fee of the lands in this contry in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land, with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to-wit, the right to possess and occupy the lands for the uses and purposes designated."

In *Parr* v. *United States*, 153 Fed. 462, the court had under consideration a similar question, and said:

> "Now, while it is true that the government can dispose of the fee, in absolute derogation of the possessory rights of the Indians, yet unless the government assumes, itself, to extinguish the Indian title, its grantee takes subject and subordinate to their possessory right. Upon the other hand, the Indian title cannot be conveyed by the Indians to any one but the United States without the consent of the latter. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. ed. 299; *United States* v. *Alaska Pack-*

ers' Association, (C. C.) 79 Fed. 152. So that, in consideration of the long-settled policy of the general government, the Indians possess such a right of occupancy in and to the lands set apart to them by treaty out of their larger dominions as no one except the government itself can disturb; and the government has always, unless in exceptional cases, *respected that right, and treated it as one of property.*

"The government having the fee of the lands upon the Umatilla reservation, and the Indians the right of exclusive occupancy and possession, the Congress has provided for allotments of such lands in severalty, but not until the consent of the Indians thereto shall have been given; nor by the act has Congress departed essentially from the stipulations of the treaty in that behalf. Looking back to the treaty, therefore, the intendment with both the government and the Indians was that the latter at some time, when developments had demonstrated their capacity to manage successfully their property affairs, should come into the ultimate title to those lands, or a portion thereof, in severalty, and be able to hold and enjoy them as citizens of the United States and of the states hold and enjoy real property; there being a joint ownership by occupancy on the part of the Indians. The fee being in the government, the allotments were had with a view to clothing the Indians with the fee in particular tracts in severalty. *There was no donation or grant in the sense of disposing of the public domain to settlers thereon, but a fulfillment of treaty stipulations;* the consideration for the allotments having long since been fully performed on the part of the Indians, and they having yet only to dem-

onstrate their capacity to manage the property to entitle them to the fee absolute. To 'allot' is:

> 'To divide or distribute, as by lot. To distribute or parcel out in parts or portions; or to distribute to each individual concerned; hence, to grant, as a portion; to give, assign, or appoint in general.' Webster's Unabridged Dictionary.

"So the purpose and process here was to distribute to each person concerned, in full accord with treaty regulations, that which was understood and conceded *to rightfully belong to the Indians themselves,* although the fee was held for them by the United States in the capacity of guardian of their property and estate; *the allotment being intended as in the nature of a partition among joint owners of realty,* whereby there should be set apart to each owner a single portion in severalty as and for his joint interest or property in the whole. The United States in making the allotments was dealing with the fee, and yet conceding that the Indians were entitled to it, and providing that in due time they should have it. *'Allot' is not a term of sale or grant, but of apportionment of that to which the parties are entitled as of right.* The Honorable WILLIAM H. TAFT, Solicitor General, advising as to the allotment of lands to individual Indians, asked: 'What is the Indian right of occupancy?' To which he answered:

> 'It is the right to enjoy the land forever, with the right of alienation limited to one alienee, the United States, or to such persons as the United States, in its capacity of guardian over the Indians, may permit.'

"And then, after stating the government's relation to the Indians as guardian he makes this further observation:

> 'Allotments in severalty of Indian land are therefore naturally evolved from the Indian right of occupancy.' 20 Opinions Attorney General, 42, 48."

This doctrine was clearly recognized by this court in the recent case of *Choate* v. *Trapp*, 224 U. S. 671, wherein Mr. Justice LAMAR said:

> "The individual Indian had no title or enforceable right in the tribal property. But as one of those entitled to occupy the land *he did have an equitable interest*, which Congress recognized and which it desired to have satisfied and extinguished. The Curtis Act was framed with a view of having every such claim satisfactorily settled. And though it provided for a division of the land in severalty, it offered a patent of non-taxable land only to those who would relinquish their claim in the other property of the tribe formerly held for their common use. For, the Atoka Agreement, after declaring that 'all land allotted should be non-taxable,' stipulated further that each enrolled member of the tribes should receive a patent framed in conformity with the agreement, and that each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of this agreement and *to relinquish all of his right in the property formerly held in common.*"

In *Martin* v. *United States*, 168 Fed. 205, the Eighth Circuit Court of Appeals, speaking through

Circuit Judge SANBORN, in referring to the rolls of citizenship of the Creek Nation, says:

> "It was a link in the chain of title of each allottee to his allotment."

The following Acts of Congress provided for the enrollment of citizens, to-wit:

1. Act approved June 10th, 1896 (29 Stat. L. 339).
2. Act approved June 7th, 1897 (30 Stat. L. 83), which act declares that the words "rolls of citizenship" used in the Act of June 10th, 1896, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation *"and the descendants of those appearing on such rolls,"* etc.
3. Original Curtis Bill approved June 28th, 1898, section 21 thereof (30 Stat. L. 495).
4. Act approved March 3rd, 1901 (31 Stat. L. 1077).
5. The 28th section of the Original Creek Agreement (31 Stat. L. 861) and sections 7 and 8 of the Supplemental Creek Agreement (32 Stat. L. 500). Section 28 of the Original Creek Agreement provided for closing the rolls, and but for that provision children born after the act would have been entitled to an allotment the same as those citizens living at the date of the various allotment acts.

—*Fairbanks* v. *United States,* 223 U. S. 215, 171 Fed. 337.

Rule of Property.

If the decision of the Court of Appeals in the *Shulthis* case, 170 Fed. 529, and the decision of the Oklahoma Supreme Court in *Pigeon* v. *Buck,* 38 Okla. 101, be wrong, they ought to be reversed, but the opinion of the Court of Appeals came down on June 3rd, 1909, about six years ago, and having been followed by the state Supreme Court, it appears to have grown, or almost grown, into a rule of property. But aside from that it would be unfortunate to sustain the contention of the plaintiff in error because it would scatter the titles to inherited lands to the four winds, and the fragments inherited by the various collateral relatives would be of little value to each, and of no market value to any, whereas, the rule announced by the Court of Appeals and the Oklahoma Supreme Court is the equitable application of the statute because it gives the land to those really entitled to it, that is, the father and the mother, and the Oklahoma Supreme Court, on January 18th, 1915, in an opinion not yet published, in *Thorn* v. *Cone,* No. 3832, applied the rule in the *Shulthis* case where the allottee died leaving a father and no mother, and held that the estate being ancestral on both the side of the father and the mother, both parents having been enrolled as citizens, one-half was inherited by the father and the other half by the mother's heirs, the court following the statement of the Court of Appeals in the *Shulthis* case that "if

the mother had been a member of the tribe then the land should properly pass to the parents equally."

The syllabus in the *Thorn* v. *Cone* case is as follows:

> "*1.* Sissy Jefferson died on or about the 13th day of February, 1903, and Lena Jefferson died on or about the 20th day of July, 1904, both having received their allotments before their deaths. *Held,* chapter 49 of the Laws of Arkansas (Mansfield's Digest), entitled 'Descent and Distribution,' controls descent of such allotments.
>
> "*2.* Mansfield's Digest, chapter 49, section 2531, provides that where the intestate shall die without descendants, if the estate comes by the father, then it shall ascend to the father and his heirs; if by the mother, the estate or so much thereof as came by the mother shall ascend to the mother and her heirs. *Held,* that under the facts in this case, the estate came to the allottees by the blood of their tribal parents by reason of the facts that they were Seminole citizens, and upon their death, the father and mother take the estates in equal parts.
>
> "*3.* Where the mother dies before descent is cast, the interest which she would have inherited if living, will go to the line of those who are of her blood to the exclusion of the father and his heirs."

Reply to Brief of John B. Meserve, *Amicus Curiae.*

The *amicus curiae* brief contends that where the allotment is made direct to the heirs, the heirs take by purchase and therefore take as a class, and

that resort should be made to the first section of chapter forty-nine of Mansfield's Digest, section 2522, for a list of the heirs, and the balance of the Arkansas law of descent ignored. In other words, where the allotment is made direct to the heirs, only one section of the Arkansas law of descent is applicable, that being the first, and that all the balance of the statute is to be ignored. If the contention of the *amicus curiae* is correct, then where the allotment is made to the heirs of a deceased citizen who left one child and two grand-children, the allotment would pass to the three in equal undivided parts—the child getting a third and each of the grand-children a third, whereas, we contend that by applying the whole of chapter forty-nine the child would receive one-half and the two grand-children the other half in equal parts. Of course if this court should adopt the theory of the *amicus curiae,* we win our case, and the judgment of the Oklahoma Supreme Court will be affirmed, but we would regard such a decision as extremely unfortunate. It would introduce a new and novel element into the already complicated land title affairs in the Five Tribes. Heretofore there have been two theories: one that the allotment was a new acquisition, and the other that it is ancestral, and around those theories the controversy has raged. Now we have a new Richmond in the field. It is wholly inconceivable to any one familiar with the Indians to believe for a moment that they ever understood or intended any distinc-

tion or difference between the *status* of heirs taking by purchase technically, and heirs taking by descent technically. As argued under the first point in this brief, it is clear that the Indians knew nothing about the technicalities of the law of descent, and the Arkansas statute should certainly be applied in a case where the heirs take by purchase just the same as where they take by descent technically.

This court, in *Worcester* v. *Georgia,* 6 Peters, 515, said, with respect to construing Indian treaties: "How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction," and likewise, again, said in *Jones* v. *Meehan,* 175 U. S. 1, that "Indian treaties must be construed not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians."

While it is true that both the Original and Supplemental Creek Agreements obtained their efficacy from the acts of Congress approving them, nevertheless, they were the result of negotiations between the Dawes Commission and the representatives of the tribe, and should be interpreted according to the rule of construction above set forth, and this court in the recent case of *Choate* v. *Trapp,* 224 U. S. 675, applied the above rule to the Supplemental Agreement with the Choctaws and Chickasaws.

In the light of the above rule of construction is it not utterly absurd to say that the Indians under-

stood the difference in the legal status of heirs taking by purchase and heirs taking by descent? They certainly never contemplated a different application of the law of descent in the two cases.

If the contention of the *amicus curiae* be sustained, then the court is in the attitude of holding that the Indians, while intending to apply the whole of chapter forty-nine of Mansfield's Digest to a case of actual descent, yet intended to apply only the first section when the citizen happened to die before he received his allotment, and the land was afterwards allotted in his name to the heirs. Such a construction would attribute to the Indians a remarkably well developed understanding of refined technicalities. Then the court can also see where such a construction would lead to. It would introduce all kinds of confusion. But chapter forty-nine of Mansfield's Digest was made applicable as an *entirety*, and under the rule announced by the Arkansas Supreme Court in *Kelly* v. *McGuire*, 15 Ark. 582, fully discussed in this brief from pages 39 to 47, it becomes material and necessary to determine whether the estate is ancestral or new *whenever we turn to the ascending line.* When there is a default of descendants, it becomes absolutely necessary to first determine whether the estate is ancestral or new, in order to find the path of inheritance in the ascending line. Besides, the Arkansas Supreme Court, in numerous decisions, *Kelly's Heirs* being one, has held that the first section of chapter forty-nine of

Mansfield's Digest must be construed in connection with the tenth section thereof, and it therefore appears impossible to carve out section one of chapter forty-nine and apply it to certain cases, and then apply the whole chapter to other cases.

We trust the court will have little difficulty in disposing of the contentions of the *amicus curiae.*

We understand it is suggested in the brief of counsel in the *Pigeon-Buck case,* a companion case, that the allotment of adopted citizens could not be classed as ancestral. That is a small matter, for we understand that there were only five adopted citizens in the Creek Nation. And suppose the allotment of an adopted citizen is a new acquisition, that is no reason for holding that the allotment of a freedman or citizen by blood is a new acquisition.

The freedmen were incorporated into the tribe by the treaty of 1866, and soon thereafter Mr. J. W. Dunn, acting under authority of the United States, made a roll of the freedmen citizens of the tribe. That roll was confirmed by the Original Curtis Act approved June 28th, 1898 (30 Stat. L. 495), section 21 thereof, which provides that

> "The roll of Creek freedmen made by J. W. Dunn, under authority of the United States, prior to March fourteenth, eighteen hundred and sixty-seven, is hereby confirmed, and said Commission is directed to enroll all persons now living whose names are found on said rolls, *and all descendants born since the date of said*

roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation."

Likewise, the Cherokee freedmen, and the Seminole freedmen were also incorporated in those respective tribes, as were also the Choctaw-Chickasaw freedmen, and their allotments are ancestral in every sense of the word.

We, therefore, respectfully submit that the case should be affirmed.

GEO. S. RAMSEY,
EDGAR A. DE MEULES,
Counsel for Defendants in Error.

APPENDIX.

Opinions of Supreme Court of the Creek Nation as of Record in Permanent Journals Kept by the Court: Now in the Custody of the Department of the Interior of the United States.

SUPREME COURT ROOM.

Dec. 5th, 1895.

Court convened as a new Court to organize it being the beginning of the Constitutional term. The newly elected Judges all present-

Judge John Reed was elected Chief Justice, *protem*- After taking his seat-he called the Court to order- and opened with prayer- The Judges John Goat- Thos Adams- Kellop Murrell were sworn in by Chief Justice. After which Judge Thomas Adams- Acting Chief Justice Pro tem administered the oath to John Reed, who was elected Chief Justice pro tem, to install Isparhecher- as Chief Executive of the Muscogee Nation- He installed the members of the house of Kings- Court adjourned to 1 o'clock - Court convened at 1 P. M. House of Kings notified the Court that the 1st & 2nd Chief was to receive the Oath of Office. The Court in a body (the Clerk bearing the Bible) repaired to the House of Kings- Where according to the law- the 1st and 2nd Chief were duly sworn in as Principal and Assistant Chief of the Muscogee Nation- After listening to the inaugeral address, and in a body attending the reception of the Chief- they assembled in the Supreme Court room and organized permanently for business.

Judge T. J. Adams was elected Chief Justice for the Constitutional term, and took his seat. Mrs. Sue M. Rogers was elected Clerk and Jack Roberson, Caller for the Supreme Court for the Constitutional term and sworn in- Court being regularly organized- proceeded to business.

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the minute of the proceeding of Supreme Court of the Creek Nation on page 264 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

SUPREME COURT, MUSCOGEE NATION,

October 10, 1890.

CATHERINE BELLSTIDT

vs.

TOBE FRANKLIN &

TACKEY GRAYSON.

This suit was brought by Plff to set aside a sale of two houses and lots in the town of Muscogee, purchased by Defendants at that sale, which sale was made by virtue of an order from the District Judge of Coweta Dist. for the collection of a bond executed by Geo. Bellstidt, the son of Plff. upon which bond Plff. was one of the Assurities, A forfeiture was taken on said bond, and Geo. Bellstidt was re-arrested tried and acquitted.

The evidence in this case shows that this property belonged to Plff., that she lived in one of the houses, and that she notified the office making the

sale, in writing, with an itemized memorandum of her property, amounting to less than five hundred dollars, and that this notice was given before the sale was made. It is also in evidence that the sale was made on the 30th day of Aug.- 1890, and that this property brought only one hundred and eighteen dollars. The evedence further shows Mrs. Bellstidt, the Plaintiff in suit, to be a citizen of this Nation, and the head of a family.

Section 2 of an act approved June 21st, 1889, says "The personal property of any citizen of this Nation who is married or the head of a family, in specific articles to be selected by such citizen, not exceeding in value the sum of five hundred dollars, in addition to his or her wearing apparel, and that of his or her family; and also all house-hold or kitchen furniture, and all agricultural and horticultural general farming implements, shall be exempt from seizure on attachment, or sale on execution, or other process from any court on debt by contract. The Court construes this section as well as the other section of this act, to be a general Exemption law, with no exceptions only such as is mentioned in the first section, which says "that no property shall be exempt for debts contracted for the purchase money therefor, while in the hands of the vendee."

It is very evedent to this court that our National Council intended by this law to shield the property of our citizens from every process of forceable seizure, when the same did not exceed the amount stipulated, which intent we cordially command, as an act of wise and patriotic legislation. Debts of all kinds, are simply the result of contracts mutually entered into between two or more parties.

A bond is as much the result of a contract as a debt- both are obligatory, and cannot be legally enforced against the obligor without a process from a court.

It is therefore the opinion of the Court that the property of a bondsman is exempt from seizure and sale, as much so as that for any character of debt. The Second Section of an act approved October 21st, 1881 page 128 of our new Digest, simply requires Dist. Judges to accept bonds of those arreigned on Criminal charges, when the assurities on such bonds shall swear that they are possessed of property to the full value of such bonds over and above all their personal liabilities. Judges are not compeled under this law to accept a bond untill the solvency of bondsmen are sworn to be equal to the amount of the bond over and above all liabilities. It is very plain that the liabilities of a bondsman whether for debt or other wise constitute a legal exemption from any forceable seizure authorized against the property of bondsmen. The act of June the 30th 1889 adds to such liabilities of bondsmen a further exemption of five hundred dollars worth of personal property which exemption Judges taking bonds must take judicial notice, and accept no bondsman who is not worth the amount of his assurance over and above all exemptions and liabilities thus recognized by law. *Improvements on our public domain are also exempt from any forceable seizure and sale for any character of Debt. Therefore Improvements on the public domain are regarded by this Court as specific articles of exemption not embraced as personal property, and must not be estimated as such, in testing the solvency of a bondsman. We regard this as a wise provision, as it protects our citizens in the possession of their homes and therefore is regarded by us as a homestead law. Other governments of superior intelligence have such laws for the protection of their citizens, and it is highly appropriated and wise we should extend such protection to our citizens. Officers of our government can not be too vigilant in protecting this sacred right to the citizen.*

Judges taking or accepting bonds should take judicial notice of all these exemptions, and reject any bondsman who does not swear that he or she is worth the full amount of the bond over and above those exemptions.

Judgment is therefore rendered for the Plaintiff in this suit- decreeing back to her the lawful possession of the property in controversy, and the Judge of Muscogee District is hereby directed to protect her in the peaceable posession of the same against any interferance on the part of the Defendants herein, or their Agent.

G. W. STIDHAM,
Chief Justice,
M. N.

S. B. CALLAHAN,
Clk.

This opinion is agreed to by judges G. W. Stidham, Wm. Jones and Hardy Stidham and discented to by Judges John Reed and Isparhecher.

S. B. Callahan, Clk.

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on pages 105, 106 and 107 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

SUPREME COURT

Aug. 5th, 1896.

HON. JAMES COLBERT
Pres. Citizenship Commission

SIR: Your communication of July 22nd, 1896, asking the opinion of this Court on the following question, has been received to wit:

"We would respectfully request you to render an opinion upon the Constitutionality of an act of the National Council, approved Oct. 26th, 1889, found on page 105, compiled laws of the M- N- Edition 1893, at as early date as possible."

In answer hereto the Court is of the opinion that this act is not inconsistant with the legislative functions of our council. It is only remedial in character, and not retroactive. There cannot be any question, as to the Constitutional authority of Council to enact any law of a remedial nature.

It only closes the door of our Nation after a lapse of nearly seventy years. All persons having citizenship rights in our Nation have certainly been afforded ample time, and opportunity to ask for them. No Indian, who loves his race, would remain out of his country for twenty-one years unless debarred from exercising his freedom- and it is equally true that if he has thus remained away, he *has* selected a home of his own choice with no intention of leaving it. It is certainly in the province of the tribal Council to close its door after wating the pleasure of these absentees for fifty years. The evident purpose of this law is simply to exclude from our Nation all persons who have never placed their foot on our soil, even though they should be full blood Creeks and the Court so construes the meaning.

Very Respectfully,

SUE M. ROGERS, *Clerk.*

T. J. ADAMS, *Chief Justice.*

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision

of the Supreme Court of the Muskogee as same appears on page 286 and 287 of the Minute Book for said Court, as on file in this office.

DEC 22 1913 J. G. WRIGHT,
C H D Commissioner to the Five Civilized Tribes.

SUPREME COURT

Case No. 143.

June 16th, 1896.

BILL MCINTOSH
JULIA GREEN
vs.
BILL WILLIAM

This is a suit for the recovery of a part of the estate of Danial Williams, as heirs thereof- consisting of one farm and homestead- thirty head of hogs and other property, scheduled as per appraisement- and also the property of Julia Green's mother, consisting of thirteen head of stock cattle, valued at five hundred dollars.

This case appears from the Docket to have been instituted Oct. 1st, 1894, and on June 8th, 1895, judgment rendered by Default for Plffs- Application was made by Deft. for a re-opening of of the case, and on June 13th,- application was granted and the case set for re-hearing Oct term 1895- continued to Nov 1895- and continued to June 1896- June term 1896- case called day after day- Plffs reporting ready- Deft not present- Evidence was submitted to the Court by Plffs- After due consideration of the facts in the case- judgment therefore is rendered for Plffs in suit - decreeing to them the lawful possession of the property in controversy- And the Judge of Muskogee Dist- is hereby ordered to place the Plffs in possession and protect them in peaceable possession of the same.

THOS. J. ADAMS,
Chief Justice,

SUE M. ROGERS
Clerk.

M. N.

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on Page 276 in the Minute Book of said Court, as on file in this office.

DEC 22 1913 J. G. WRIGHT,
C H D Commissioner to the Five Civilized Tribes.

SUPREME COURT

Case 161

June 18th, 1896.

Mrs. E. E. Weldon
vs.
Mrs. Patty Overton.

This case is for the recovery of fifty acres of land near Wagoner, I. T.- valued at Five ($500.00) Hundred Dollars and damages, Three ($300.00) hundred dollars.

A careful and thorough investigation of the evidence brought to bear in the case, shows that the peice of land in controversy, was public domain, and that the Deft Mrs. Patty Overton was the first to make improvements thereon-

It is therefore the opinion of the court, that the Deft Mrs. Patty Overton has the legal right of occupancy, and judgment is hereby rendered in her favor.

Thos. J. Adams,
Chief Justice,

J. H. Lynch
Clerk.

M- N-

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the

Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 279 of the Minute Book for said Court, as on file in this office.

DEC 22 1913 J. G. WRIGHT,
C H D Commissioner to the Five Civilized Tribes.

SUPREME COURT

Nov. 30th, 1891.

M. B. JONES
vs.
ROBINSON ROBERTS &
GEORGE ROBERTS

This is suit for the recovery of a farm valued at three hundred dollars.

The testimony in this case discloses the fact that these defendents sold to Plff. a certain farm for three hundred dollars and received payments thereon at different times amounting to one hundred and thirty nine dollars and fifty cents; forty four dollars and fifty cents of which amount has been returned to Plff. and now under his control. It is also shown that no definite time was designated when final payment for said farm should be made; and that Defts. before demanding final payment therefor, nor without the knowledge or consent of Plff. sold said farm to another party, and then returmed to Plff. forty four dollars and fifty cents. It is also shown that the farm in controversy belong to Robinson Roberts one of these Defts. who is now dead, and who is the son of Geo. Roberts, the other Deft. At the time this sale was made to Plff. both these Defts. were present and both acted jointly in receiving the payments for said farm.

It is the opinion of the Court that the sale of said farm to Plff. was a valid sale and his posses-

sion and control therefore could not be disturbed by any subsequent sale made by either of these Defts. The only remedy these Defts. had against Plff. for the return of this farm to them, was only a failure of payment, for every species of property sold must stand good for the purchase money until fully paid for. It appears that Plff. still owes Deft. a balance of two hundred and five dollars on said farm.

It is therefore ordered and decreed by the Court that Plff. have and hold said farm and shall have until the first day of May 1892 to pay Deft. the balance due on said farm which balance he may pay in cash or in cattle and horses at a fair Cash valuation.

M. L. CHECOTE
Clk.

S. B. CALLAHAN,
Chief Justice.

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on pages 150 and 151 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

Okmulgee I. T.

DOCTOR WILLINGHAM

vs.

YARKENHA *(et al).*

This suit is for the recovery of an estate of John Willingham (Decease) which was appraised by Judge March Thompson of Eufaula Dist- And was divided into two equal parties, one half of which was given to one Doctor Willingham (In the eyes of

the law) the true heir- which requires the nearest blood relation.

The evidence in the case shows that at the time of the death of John Willingham- There were two heirs, a son and a daughter, but before the estate was properly appraise, and given to the two heirs, the daughter died and only the son, remain as the true heir to the estate, But the evidence in the case shows that half of the property was given to three different person's who are not heirs to the estate, on a suppose ruling of the Supreme Court- which is not on record. There is no law or ruling on record, that would take from the true heir any part of the estate- Unless it be for honest debt. Therefore the opinion, and decission of this court is that the action of the judge of Eufaula Dist. be and is hereby reverse, and the Judge be instructed to turn the property over to Doctor Willingham the true heir- by its light- horse men. Done this the 11th day of June, 1893.

J. H. LAND
Clk.

WM. F. MCINTOSH,
Chief Justice.

M-N

Department of the Interior.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 181 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

SUPREME COURT OF MUSKOGEE NATION.

Okmulgee, I. T. Nov. 3rd, 1894

LIDIA CHILDERS
vs.
NANCY DREW

This is a cause wherein Lidia Childers is the Plaintiff and Nancy Drew is the Def'd'nt. The cause of action being for the recovery of a farm and improvements, now in possession of the def'd'nt under lease to certain non-citizens.

The court herein decides, that in the absents of any showing on the part of said Nancy Drew and she (Nancy Drew) failing to answer the complaints of said Lidia Childers, that the said farm and improvements are the property of Lidia Childers and it is so declared.

In testamony whereof I hereunto fix the seal of this court and my Official signature.

O. A. MORTON, *Clk.* — W. F. McINTOSH, *Chief Justice M N*

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 241 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

SUPREME COURT

Dec. 2nd, 1891.

ELSIE COBB

vs.

R. R. BRUNER

This is a suit for the recovery of a debt of 408 dollars.

The evidence in this case shows that Plff purchased a farm from Deft. for one hundred and fifty dollars and executed a note for the same, on which note payment had been made to the amount of thirty eight dollars, when said farm was taken from Plff by law. It also appears that all the rails and other articles placed on said farm by Plff. have been removed therefrom by Plff.

It is therefore the opinion of the Court that the amount involved in this case does not reach one hundred dollars; and therefore not within the jurisdiction of this court. The case is therefore dismissed from the docket.

M. L. CHECOTE, *Clk.* SAML. B. CALLAHAN, *Chief Justice.*

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 149 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

WM. MCINTOSH
AND
JULIA GREEN
vs.
BELL WILLIAMS

This is a suit for the recovery of the following property as part of the effects of the estate of Daniel Williams as the heirs thereof, to wit; One farm and homestead, thirty head of hogs, and other property as scheduled for appraisement, and also the property of Julia Green's mother's estate consisting of thirteen head of stock cattle valued at five hundred dollars. This case appears from the docket to have been instituted October 1st 1894. The facts herein are that on June the 8th 1895 Plffs. and Deft was called for announcement, when Plffs. announced ready for trial, but Deft appeared not, whereupon Plffs submitted to the court their evidence and upon hearing hereof, the Court rendered Judgment for Plffs by default.

W. F. MCINTOSH,
Chief Justice.
M N

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on page 246 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

June 10th

Court met pursuant to adjournment at 9 A M

Present all the Judges. Court opened with prayer by the Chaplain. Minutes of yesterday read and approved. The case of Lydia Childers vs. Nicy Drew was taken up for trial and after the testimony was submitted and argument of Council heard the Court rendered judgment for the Plff as follows, June 12th 1895.

This is a suit for the recovery of a farm and improvements, conprising about 65 acres of land valued at $250.00 dollars.

It appears from the evidence that Plff bought an improvement consisting of a house and a field of 20 acres of land, also included in said purchase a piece of uncultivated land adjoining to said field, around which her vendor had plowed some furrows, and obtained the consent of the owner of two strings of fence bordering thereto to join fence with them, and that she paid the purchase money as alledged.

It is also shown that Deft is in possession of said uncultivated land by virtue of a seven year lease with a noncitizen and by no other right.

It is held by the Court that unimproved land adjoining to an improvement cannot be taken by other than the owner of such improvement, or by the consent of such owner. It is also held that furrows stakes or any other marks of designation showing the meets and bounds of unimproved land adjoining an improvement, is sufficient evidence to establish the intent of a citizen to use said land for individual purposes, and vests in such citizen constructive possession thereof, provided such marks of designation shall embrace a reasonable quantity of land for farming purposes only.

It is further held that possession of land in this

Nation by a noncitizen is illegal and void, unless such possession shall be by virtue of rental contract for a period not to exceed one year.

It is therefore the opinion of the court that Plff herein is entitled to the lands in controversy and the Court so decrees.

S. B. CALLAHAN, *Clerk*

W. F. MCINTOSH, *Chief Justice.*

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Creek Nation as same appears on pages 247 and 248 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

MUSKOGEE NATION
vs.
G. W. GRAYSON

This is a cause wherein the defendant G. W. Grayson was sued in this court at its last June term, by the Muskogee Nation represented by A. P. McKellop, and others for the recovery of $1276.75- money of which the national safe was robbed over ten years ago, when defendant was treasurer of the Nation- It is urged by counsel for the Nation that under act of Nov. 3rd, 1893 Defendant is liable and indebted to the Nation in the sum of the amount stolen- namely $1276.75 with interest to date, and this Court is prayed to render judgment to that effect. The Defendant G. W. Grayson denies that he is now, or ever was indebted to the nation in the amount claimed, and avers that there is no founda-

tion either in law or facts on which to predicate said claim against him.

The cause was fully discussed by Council and submitted to this Court.

The associate Justices divided equally on the question and it finally rested with the Chief Justice to decide. In order to give myself ample time for a fair and full consideration of the subject thus left to me, I postponed final action until the present cession.

Now the cause is one upon which much time and attention has been bestowed and further, elaboration is unecessary. Sufficient it is to say that the act of Nov. 3'93 clearly intends and propoeses to take effect upon a thing that occurred many years before its enactment; upon this point there can be no controversy and upon this point the Constitution is equally clear and leaves no room for misconstruction. Article 8 and 2 reads as follows: No laws taking effect upon things that occurred before the enactment of the laws shall be passed; In this case the occurrence took place over ten years ago while the law under which action is brought was only enacted Nov. 3rd, 1893. With these lights before me the conclusion is forced that the said act of Nov. 3rd 1893 is unconstitutional null and void. There being therefore no warrant in law for action in this case. The cause of the Muskogee Nation against G. W. Grayson must of necessity be dismissed and the Court hereby so orders.

J. H. LAND, *Clk.* W. F. MCINTOSH, *Chief Justice*, M. N.

Department of the Interior.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the

Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Supreme Court of the Muskogee Nation as same appears on pages 228 and 229 in the Minute Book of said Court, as on file in this office.

DEC 22 1913
C H D

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

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In the Supreme Court of the United States

October Term, 1914

Daniel A. McDougal, *Plaintiff in Error,* vs. Edmond McKay *et al.*, *Defendants in Error.*	**No. 676**

In Error to the Supreme Court of the State of Oklahoma.

Brief by Amici Curiae.

STATEMENT.

The parties to the record in the case at bar have by mutual consent treated this case as presenting but a single question, viz: Did Andrew J. Berryhill take an estate *ex parte paterna* in the allotment made to his heirs after his death, under

section 7 of the Supplemental Creek Agreement (32 Stat. L. 500), or is said allotment to be treated as a new acquisition in the said Andrew J. Berryhill? It is assumed by both parties that this allotment must be treated either as an ancestral estate or as a new acquisition *in Andrew J. Berryhill.*

It is our position that it is neither, but that it is a new acquisition in the *heirs* of Andrew J. Berryhill. If this latter position is to be presented to the court before the decision in the case at bar, it must necessarily be done by the briefs of *amici curiae.* Counsel for plaintiff in error can not be expected to advance this position, since if it is sustained the judgment of the court below must be affirmed. Counsel for defendant in error also reject this theory of the law and elect to stand or fall on the theory that the allotment must be treated as an estate coming to Andrew J. Berryhill by descent from his tribal parent. The position of counsel for defendant in error is frankly stated in that part of their brief devoted to a reply to the brief of John B. Meserve, Esquire, *amicus curiae.* At page 66 of their brief, counsel for plaintiff in error says: "Of course if this court should adopt the theory of the *amicus*

curiae, we win our case, and the judgment of the Oklahoma Supreme Court will be affirmed, but we would regard such a decision as extremely unfortunate. * * *." Again, at page 69 it is said: "We trust the court will have little difficulty in disposing of the contentions of the *amicus curiae*."

On some of the questions of the law involved we agree with counsel for plaintiff in error, on others we agree with Mr. Meserve, and we agree with Mr. Meserve in his conclusion that the land is a new acquisition, not in Andrew J. Berryhill, *but in his heirs*. However, we reach this conclusion by a somewhat different process of reasoning. It is not our purpose to burden the court with a repetition of the argument of other counsel. To a great extent this brief will be confined to the discussion of certain principles of law which we deem controlling, but which have not been presented in any of the other briefs on file in this case.

Our contentions may be briefly stated as follows:

1. Had Andrew J. Berryhill lived to receive an allotment he would have taken the same, not technically merely, but substantially, by purchase

from the United States and the Creek Nation, and not by descent from his tribal parent.

2. Had Andrew J. Berryhill lived to receive his allotment, he would have taken the same, as a new acquisition, by purchase from the United States and the Creek Nation, even if it be assumed for the purpose of the argument that he took an equitable or beneficial estate therein by descent from his tribal parent; because the source of the legal title is the controlling factor in determining whether an estate be a new acquisition or an ancestral estate.

3. Andrew J. Berryhill having died prior to the enactment of the legislation authorizing the making of an allotment to his heirs, and no estate, therefore, having vested in him, said allotment was not an acquisition, new or otherwise, in Andrew J. Berryhill; hence the allotment did not descend to his heirs either as an ancestral estate or as a new acquisition, under section 2531 of Mansfield's Digest, but vested in his heirs, under section 2522 of Mansfild's Digest, by direct grant from the United States and the Creek Nation, becoming a new acquisition in said heirs.

These three propositions will be discussed in the order stated. Before entering upon their discussion, however, we desire briefly to consider whether a rule of property has been established by the decision of the Circuit Court of Appeals for the Eighth Circuit in *Shulthis* v. *McDougal,* 170 Federal 529.

ARGUMENT.

No Rule of Property Has Been Established By the Decision of the Circuit Court of Appeals in Shulthis vs. McDougal, and the Decisions of the Supreme Court of Oklahoma Following It.

This supposed rule of property rests solely upon the authority of a single case *(Shulthis* v. *McDougal)* decided by an intermediate appellate court. It is true that the judgment of the Circuit Court of Appeals was final in that particular case, because diverse citizenship was the sole ground of jurisdiction of the Circuit Court. *Shulthis* v. *McDougal*, 225 U. S. 561. But the question involved was one which could only be finally settled by the decision of the Supreme Court of the United States. The decisions of the Supreme Court of the State of Oklahoma following *Shulthis* v. *McDougal* are likewise the decisions of a court which, as to such questions, is also but an intermediate appellate court. Not only this, but the decisions of the State Supreme Court are based *not* upon the independent judgment of the court, but upon the ground that the decision of the Circuit Court of Appeals established a rule of property. And these decisions of the Supreme Court of Oklahoma have not been accepted as establishing a rule of

property. They have been brought to this court for review, and are now before this court for its decision. That these decisions of these intermediate appellate courts, Federal and State, have not been accepted as establishing a rule of property is evidenced by the fact that as late as January 19th, 1915, the Supreme Court of Oklahoma was again called upon to pass upon the question in *Thorn* v. *Cone*. (See brief of defendant in error, pages 64 and 65.)

We do not believe that the learned Circuit Court of Appeals would itself treat its decision in *Shulthis* v. *McDougal* as establishing a rule of property. In *Anglo-American Land, M. and A. Co.* v. *Lombard*, 132 Federal 721, 741, Circuit Judge Van Devanter (now Mr. Justice Van Devanter of the Supreme Court), speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

> "The decision of the Kansas City Court of Appeals in *City of Goodland* v. *Bank*, 74 Mo. App. 365, is alone cited in support of this contention. A fixed and settled rule of decision in a state court of last resort establishes the law of the state in such manner as to bind the Federal courts in all matters controlled by the state law; but the opinions of intermediate appellate courts, like the Kansas City Court of Appeals, while entitled to great

> respect and regarded as persuasive authority, are not controlling upon the Federal courts, because they do not settle the law of the state."

In determining whether a rule of property has been established by the decisions of the Circuit Court of Appeals and by the Supreme Court of Oklahoma in the cases now before this court, it is important to consider the scope of those decisions. In no just sense can it be said that in *Shulthis* v. *McDougal* the Circuit Court of Appeals merely construed the Supplemental Creek Agreement and chapter 49 of Mansfield's Digest, and that therefore its decision was on a matter of merely local concern. The decision was much broader than that. It proceeded on the theory that the rights of the allottee were not created by the allotment act. The theory of the decision is expressed in 170 Federal at page 534, where it is said:

> "But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it can not be said that the property which passed to an allottee is a new right or acquisition by the allotment. The right to the property an-

tendates the allotment, and is simply given effect to by that act."

Thus it will be seen that the court's decision was upon a question of general concern, affecting not only the Five Civilized Tribes, but the Indians generally throughout the United States.

Not only is the decision on a matter of more than local concern on the general question of the origin of the rights of individual Indians in tribal land—the identical question here presented may arise with reference to Indian allotments in the other states. Section 5 of the Act of February 8th, 1887, 24 Stat. L. 389, provides for the issuance of trust patents declaring that "the United States does and will hold the land thus allotted, for a period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or to his heirs as aforesaid, in fee * * * "

The provision of section 2531 of Mansfield's Digest confining ancestral estates to the blood of the ancestor is merely a recognition of a rule of

common law, very generally in force in this country. It is apparent therefore that wherever this rule of the common law prevails the question of heirship to deceased Indian allottees under the Act of February 8, 1887, will be affected by the decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal*, if it is followed by this court. This is a Federal question. Upon its determination hinges the question of the right to final patents under the Act of 1887. We submit, therefore, that no decision of any court other than the Supreme Court of the United States can be said to establish a rule of property on this question.

In *Calhoun Gold Mining Company* v. *Ajax Gold Mining Company*, 182 U. S. 499, it was held by this court that no rule of property was established by the decisions of the highest court of a state, construing sections 2322 and 2336 of the Revised Statutes of the United States, which deal with the rights of the locators of mining locations on public lands. In that case the Supreme Court of Colorado had overruled its earlier decisions construing these sections of the statute. It was insisted in the state court, and again in this court, that the earlier decisions of the state court had established a rule of property. In the opinion of

this court by Mr. Justice McKenna (p. 504) it is said:

> "The third proposition involves the relation of sections 2322 and 2336. It is first discussed by plaintiff in error, and is given the most prominence in the argument, and we, therefore, give it precedence in the order of discussion. It presents, for the first time in this court, the rights of a junior location of a cross vein within the side lines of a senior location under section 2336. Prior to the decision by the Supreme Court of Colorado in the case at bar that court had decided that the junior location was entitled to all of the ore found on his vein within the side lines of the senior location, except at the space of intersection of the two veins. *Branagan* v. *Dulaney* (1885), 8 Colo. 408, 8 Pac. 669; *Lee* v. *Stahl* (1886), 9 Colo. 208, 11 Pac. 77; *Morgenson* v. *Middlesex Min. and Mill. Co.* (1887), 11 Colo. 176, 17 Pac. 513; *Lee* v. *Stahl*, 13 Colo. 174, 22 Pac. 436. In *Coffee* v. *Emigh* (1890), 15 Colo. 184, 10 L. R. A. 125, 23 Pac. 83, it was held that the rule laid down in the foregoing cases had become established law. The claims of the plaintiff in error were located after the decisions, and it is contended that the rule laid down by them became a rule of property in the state, and it is earnestly urged that to reverse the rule now would take from plaintiff in error that which it 'had reason to believe was a vested right in the Victor Consolidated vein.'
>
> "There are serious objections to accepting that consequence as determinative of our judgment. *We might by doing so confirm ti-*

> *tles in Colorado, but we might disturb them elsewhere.* The statute construed is a Federal one; being a law, not only for Colorado, but for all of the mining states and, therefore, a rule for all, not a rule for one, must be declared. Besides, what consideration should have been given to prior cases, the supreme court of the state was better able to judge than we are. It may be that the repose of titles in the state was best effected by the reversal of the prior cases. At any rate, a Federal statute has more than a local application, and until construed by this court can not be said to have an established meaning * * * "

We submit that under this decision no rule of property has been established by the decisions of the Circuit Court of Appeals and the state court under consideration here. The question of the nature and extent of the rights of tribal Indians prior to the allotment of their lands in severalty is obviously a question of more than local concern. This is apparent when it borne in mind that the general allotment act of 1887 provides for the issuance of final patents to the heirs of deceased allottees according to the law of the state in which the allotments are located. It is clear that a decision holding that such allotments are to be treated in effect as having come to the allottees on the part of their tribal parents will effect the disposition of such lands by the government in all

states where the common law rule preserving ancestral estates in the blood of the ancestor prevails; and if such a ruling by this court is based upon the ground that a rule of property has been established by the decisions of the Circuit Court of Appeals for the Eighth Circuit, and of the Supreme Court of the State of Oklahoma, then the law has been settled governing estates outside of the Eighth Circuit by the decisions of the courts of another territorial jurisdiction.

These considerations, we submit, preclude the giving of controlling effect to the decisions of the Circuit Court of Appeals and of the Supreme Court of the State. If this be true, *a foritori*, do the same considerations preclude the giving of controlling effect to the views which may have been entertained by lawyers of the former Indian Territory? We concede that if the decision in *Shulthis* v. *McDougal* would otherwise establish a rule of property, the fact that it has not been accepted by the *nisi prius* courts, the bar, and the people generally, may properly be considered as a justification for the refusal of the court to accept it as such.

But the opinions of the members of the Oklahoma bar can have no greater effect than this.

Certainly they cannot of themselves establish a rule of property on a question of more than local concern. Hence we submit that the court will not allow its judgment to be controlled by such considerations as are urged on page 66 of the brief of defendant in error:

> "Of course if this court should adopt the theory of the *amicus curiae* we win our case, and the judgment of the Oklahoma Supreme Court will be affirmed, but we would regard such a decision as extremely unfortunate. It would introduce a new and novel element into the already complicated land title affairs in the Five Tribes. Heretofore there have been two theories: One that the allotment was a new acquisition, and the other that it is ancestral; and around those theories the controversy has raged. Now we have a new Richmond in the field * * * "

We submit that the fact, if it be a fact, that the controversy in Oklahoma has raged over the question stated by counsel in the above excerpt from their brief does not require the acceptance of one or the other of the two theories to which counsel seek to confine the attention of the court. I both of these theories overlook well settled rules of law, then certainly they ought not to be accepted, especially in view of the fact that the decision in this case must be of general and not merely local concern.

It must be assumed, we submit, that counsel in other states where these questions unquestionably have arisen in the past, have advised their clients according to established principles of law, and their clients have acted upon such advice. It would be unfair on a question of general concern to overturn transactions based upon such correct legal advice merely because a controversy may have been waged in a single locality between those holding to opposing theories, neither of which are supported by sound legal principles. We submit, therefore, that the question is not what opinions have been entertained by members of the Oklahoma bar—it is rather what are the established legal principles applicable to this situation.

If, as is conceded by counsel for defendant in error at page 66 of their brief, notwithstanding the decision in *Shulthis* v. *McDougal,* controversy has "raged" over the question decided in that case, the following quoted from the opinion of the Supreme Court of Colorado in *Calhoun Gold Mining Company* v. *Ajax Gold Mining Company,* 27 Colo. 1, 59 Pac. 607, 611, is peculiarly applicable to this case:

> "It is a matter of common knowledge that ever since the decision of this court on that

question its correctness has been doubted by many eminent members of the bar of this state familiar with mining laws, and has even been the subject of expression to that effect by this court. *Milling Co.* v. *Turner,* 23 Colo. 400, 48 Pac. 685, in which it is said, in speaking of the rights conveyed by patent to a mining claim, that it conveys all lodes or veins having their apexes within the boundaries of such claim except, perhaps, cross lodes. This doubt has been generally entertained by those engaged in mining so that, notwithstanding the length of time which has elapsed since the rendition of the first decision of this court on this question, it is safe to assume that it has not been implicitly relied upon as a sound exposition of the law relating to cross leads, and that, in the great majority of instances, parties have governed themselves accordingly. The law construed in *Branagan* v. *Dulaney* is an Act of Congress. The doctrine of *stare decisis* is based upon the assumption that the rules of law to which this doctrine applies have prevoiusly been determined by a court having final jurisdiction of the questions involved. For this reason, where the decision of a tribunal is subject to review by one having superior authority over it for that purpose, or the question determined may be passed upon by such tribunal in another case, the doctrine of *stare decisis* does not apply with full force until the same questions have been determined by the court of last resort. The construction of an act of Congress can not be said to be authoritively settled until passed upon by the highest court authorized so to do. This is the Supreme Court of the United States. It has never de-

cided the question regarding cross veins as presented in the case at bar. The decision of this court on that question may be reviewed by that tribunal; so that, although this court has given the statutes affecting cross lodes a construction which has since been followed in this state, nevertheless, as the same statutes are still open to construction by the highest tribunal of the land, their meaning on the subject of cross lodes as involved in this case has not been finally determined, so as to become *stare decisis.* In Arizona, California and Montana a different construction regarding the rights of cross-lode claimants has been given from that announced by the Supreme Court of this state. *Mining Co.* v. *Leach* (Ariz.), 33 Pac. 418; *Wilhelm* v. *Sylvester,* 101 Cal. 358, 35 Pac. 997; *Pardee* v. *Murray,* 4 Mont. 234, 2 Pac. 16. Whether or not the reasons given for this conclusion are sound is not material. Sooner or later this question may be determined by the Supreme Court of the United States, and when it is, the law thus settled must be followed by all the courts of the states and territories in which the act in question is in force. For these reasons we conclude that, although this court has passed upon the identical question regarding cross veins now involved, it is not precluded from again considering it, under the doctrine of *stare decisis,* or that the law as announced by this court in previous cases has become a settled rule of property in this state; and if, upon a reconsideration of such question, we conclude that our previous decisions thereon were wrong, we should not wait for a superior tribunal to so declare." In *Wilson* v. *Beckwith,* 140 Mo. 359, 41 S. W. 985, it was held (first point of syllabus) that:

> "The Supreme Court may reconsider and overrule an opinion announced on a former appeal respecting title to real property, especially where vast property rights are involved, and where it is improbable that many titles were acquired on the strength of the former opinion."

Mr. Justice Gantt, delivering the opinion of the court *in banc* said:

> "In as much, then, as this case involves a question of title that may and probably will affect the ownership of at least 10,000 acres of land similarly situated, and the litigation has been kept alive during all the time that has elapsed since the former opinion, it cannot with much confidence be asserted that it has been accepted or acquiesced in so as to have become a rule of property; certainly not one of very long standing. Few titles, under the circumstances, can reasonably be presumed to have been acquired on the strength of the opinion rendered on the former appeal."

It must be remembered that in the case at bar the rights of the parties were acquired before the decision of the Court of Appeals in *Shulthis* v. *McDougal.* In *Kuhn* v. *Fairmont Coal Company,* 215 U. S. 349, 361, it was decided that the Federal courts are not bound by the decisions of the highest court of a state on a question of state law where the rights of the parties to the litigation in the Federal court accrued prior to

the decision of the question by the state court. Mr. Justice Harlan, speaking for the court, said (page 361):

> "Whether such a case involves a rule of property in any proper sense of those terms, or only a question of general law, within the province of the Federal court to determine for itself, the fact exists that there had been no determination of the question by the state court before the rights of the parties accrued and became fixed under their contract, or before the injury complained of. In either case, the Federal court was bound under established doctrines to exercise its own independent judgment, with a leaning, however, as just suggested, for the sake of harmony, to an agreement with the state court, if the question of law involved was deemed to be doubtful."

And finally, as we shall undertake to show at another place in this brief, the decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal* is in conflict with the decision of this court in *Sizemore* v. *Brady,* 235 U. S. 441.

Had Andrew J. Berryhill Lived to Receive an Allotment, He Would Have Taken the Same, Not Technically Merely, But Substantially, by Purchase From the United States and the Creek Nation, and Not by Descent From His Tribal Parent.

The first question presented for consideration is as to the nature and character of the estate of a Creek citizen allotted to him in severalty under the acts of Congress on the subject. Is such estate a new acquisition, or is it an ancestral estate coming to the allottee on the part of his tribal parent? For the purpose of the discussion of this question we shall deal with it as if Andrew J. Berryhill had lived to acquire an allotment—reserving for later consideration the question of the effect of his death, and the making of the allotment, not to him, but to his heirs. Our first effort will be to show that an allotment made to or for a Creek citizen can not be said to come to such citizen by his tribal parents, and that had Andrew J. Berryhill lived to receive an allotment he would have taken the same, substantially as well as technically, by purchase from the Creek Nation and the United States, and that the same would have been a new acquisition in the said Andrew J. Berryhill.

This contention is of course opposed to the conclusion and judgment of the court below. The decision of the court below is rested upon the authority of *Shulthis* v. *McDougal*, 170 Fed. 529, and the reasoning in that case is relied upon by defendant in error in support of the judgment in the case at bar. Therefore our attention will first be directed to that decision.

The theory of *Shulthis* v. *McDougal* is that while technically the allotment made to or for a Creek citizen does not descend to him from his tribal ancestors, nevertheless his right thereto antedates the allotment, and that for practical purposes it may be said that he inherits the same from his tribal parents. Counsel for defendant in error concedes that technically the allotte takes by purchase, but insists that "substantially" he takes by inheritance from his tribal parents, and that therefore his estate must be treated as an ancestral estate coming to him on the part of his tribal parent or parents.

It is most respectfully urged that there are several obstacles in the way of the acceptance of this position. It is based upon the assumption that the allotment of these lands was in effect the partition of an estate between tenants in com-

mon. This theory would seem to be in conflict with the view repeatedly expressed by this court, which was last stated in *Sizemore* v. *Brady*, 235 U. S. 441, as follows:

> "Anterior to the legislation which we must consider, the Creek lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise, the right was at an end. It was neither alienable nor descendible."

However, in the view we take of this case it is immaterial whether these tribal lands be treated as having belonged to the tribe as a community, or to its members as tenants in common. Let us assume for the purpose of this discussion that these lands were in fact held by the citizens of the tribe as tenants in common. If so, Andrew J. Berryhill must be treated as one of these tenants in common. This is recognized by counsel for defendant in error at page 8 of their brief, where it is said:

> "The lands were to be allotted in severalty by the Commission only to citizens whose names appeared upon the authenticated and approved rolls of citizenship. These rolls of

citizenship made up the aggregate list of units to whom the lands of the Creek Nation were to be set apart and conveyed. The dead citizen *was*, however, the *unit of allotment*, and so held by the Secretary of the Interior in a written opinion."

If, therefore, the allotment of these lands be treated as a partition thereof among tenants in common, according to the theory of defendant in error, Andrew J. Berryhill must be treated as one of the *units* of allotment or partition.

What is a partition of land between tenants in common?

"At common law the conveyances called original or primary, by which an estate was first created, included feoffment, gift, grant, lease, exchange and partition. * * * ."

Devlin on Deeds (3rd Ed.), Sec. 9.

"Partition is a division of real estate made between joint owners, such as co-parceners, joint tenants, or tenants in common. When partition was made between joint tenants or tenants in common, a deed was required, and in every case livery of seisin was necessary. [Citing 2 Blackst. Com. 324.] In a legal sense the word 'partition' means 'the act or proceeding through which two or more *co-owners* caused the thing to be partitioned, to be divided into as many shares as there are owners, and which vest in each of such persons a specific part, with the right to possess it, free from a title right in other persons who before

> partition had an equal right to possess.' It is a separation between joint owners or tenants in common of the interests held in land by them respectively, and a setting apart of such interests so that they may enjoy and possess the same as owners in severalty."

Obviously when land is partitioned the parties accepting their respective portions in severalty relinquish all interest they may theretofore have had in the shares set aside in severalty to their co-owners. This relinquishment is not a gift. The share set aside to each party in severalty is a full consideration for the relinquishment of his former interest in common.

The so-called partition or allotment of the lands of the Creek Nation was made under the act of Congress commonly known as the Original Creek Agreement (chapter 676, 31 Stat. L. 861), as amended by the supplemental agreement. These agreements were not only acts of Congress, but they were ratified by the tribe. Sec. 23 of the Original Agreement reads as follows:

> "Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who

has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

"The principal chief shall, in like manner and with like effect, execute and deliver to proper parties deeds of conveyance in all other cases herein provided for. All lands or town lots to be conveyed to any one person shall, so far as practicable, be included in one deed, and all deeds shall be executed free of charge.

"All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in his deed.

"Any allotee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title, and interest in and to the same, except in the proceeds of lands reserved from allotment.

"The acceptance of deeds of minors and incompetents, by persons authorized to select their allotments for them shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein.

"The transfer of the title of the Creek Tribe to individual allotees and to other persons, as provided in this agreement, shall not inure to

the benefit of any railroad company, nor vest in any railroad company, any right, title or interest in or to any of the lands in the Creek Nation.

"All deeds when so executed and approved shall be filed in the office of the Dawes Commission, and there recorded without expense to the grantee, and such records shall have like effect as other public records."

It must be assumed, we take it, in the absence of evidence to the contrary, that the tribal parent of Andrew J. Berryhill accepted an allotment for himself under this agreement. By so doing he must be deemed to have relinquished any right, title or interest he may have had in or to the remaining lands of the Creek Nation, including the 160 acres alloted to the heirs of Andrew J. Berryhill.

It is clear that the estate in severalty set apart to a tenant in common by partition proceedings can not ordinarily be said to have come to him either by descent, or by gift from his co-tenants. If such estate in severalty so partitioned off to a party can be held to be an ancestral estate, it can only be on the theory that his estate as a tenant in common came to him as an inheritance from his ancestor, and that therefore his estate in severalty

under the partition proceedings retains the same character.

Can it be said that Andrew J. Berryhill inherited from his father an estate as tenant in common in these tribal lands? We submit that it can not, either technically or substantially. In consideration of this question the distinction between membership in the tribe or *tribal* blood and *family* blood must be observed. The very fact that estates which, in the language of the statute, "come by the father" or "come by the mother" are styled *ancestral* estates is indicative of their character as estates coming from the father or mother, or persons of the family blood of such parents.

The statute itself is unambiguous. Sec. 2543 reads as follows:

> "The expression used in this act, 'where the estate shall have come to the intestate on the part of the father,' or 'mother,' as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise or descent from the parent referred to or from any *relative* of the blood of such parent."

And in *Kelly's Heirs* v. *McGuire's Heirs*, 15 Ark. 555, the court said:

> "The expressions 'come by the father' or 'mother' or on the 'part of the father' or

'mother' mean the same thing. They are familiar to, and derived from the common law, having an appropriate technical meaning which we must suppose the legislature intended to adopt. They embrace not only the father, but all of the *ancestors* of the father, both paternal and maternal. * * *

"The expression then 'come by the father' or 'mother' is not limited to an estate acquired by descent merely, but includes an estate which comes to the intestate by gift, devise or descent from the parent referred to, or from any *relation* of the blood of such parent. Such is the letter and spirit of the statute. * * *

"If the son should purchase land from the father or mother for a valuable consideration, it would be a new acquisition and descend as such; because nothing is received by way of bounty at the hands of ancestors, which is the case as to lands descended from or derived or given by them to the intestate, and it was thought reasonable that they should remain in the blood from which they came."

If for the purpose of fixing the character of ancestral estates upon these allotments, tribal blood or tribal membership might be substituted for the family blood required to constitute an ancestral estate under the Arkansas statute, then we submit that consistency would require that the same substitution of tribal blood or tribal membership in place of the family blood con-

templated by the Arkansas statute should be made in determining the heirs, and that all persons of the tribal blood or membership should be deemed to be of the blood from whence the estate came, although not of the family blood of the allotee, and that therefore *all* such persons of tribal blood or membership should be deemed to be the heirs of the allotee as to such so-called ancestral estate. If the substitution of tribal blood for family blood be warranted, then clearly under the Arkansas statute all relatives of the allotee not of the tribal blood would be excluded from taking such allotments as heirs of the allotee. Clearly this was not intended. This court has held that such non-citizen relatives are not excluded.

Section 6 of the Supplemental Creek Agreement is inconsistent with any such intent on the part of Congress. It contains this proviso:

> "Provided, that only citizens of the Creek Nation, male or female, and their Creek descendants shall inherit lands of the Creek Nation: And provided further that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

The contingency mentioned in this proviso is one that could not possibly arise if the statute

substitutes tribal blood or membership for the family blood of the Arkansas statute. If such tribal blood or membership be substituted for family blood, then clearly non-citizens heirs could only take in the event that all persons of Creek citizenship should become extinct—so remote a possibility that it is impossible to conceive of Congress providing for the taking by non-citizen heirs in that contingency. It is clear, we submit, that Congress never intended that tribal blood or membership should by analogy be treated as the equivalent of family blood in the construction of the Arkansas statute of descent and distribution.

As we shall presently show, it is well settled that an estate is not an ancestral estate unless it comes *wholly* by descent, devise or gift from the ancestor. If the father of Andrew J. Berryhill ever had an estate as tenant in common in the tribal land, the allotment act recognized this estate as tenant in common only to the extent of entitling him to his own allotment in severalty, and expressly provided that the acceptance of such allotment should extinguish his right, title and interest in and to all other lands of the tribe (as tenant in common, or otherwise), "except in the *proceeds* of lands reserved from allotment." It can not be

said, therefore, that the Andrew J. Berryhill allotment was a portion of the estate as tenant in common of his father, or that it came to the heirs of Andrew J. Berryhill on the part of the father of the latter, since whatever interest the father may have had prior to the allotment was exhausted when he took his own allotment, leaving nothing to descend to Andrew J. Berryhill or any other of his heirs.

It is true that the interest of Andrew J. Berryhill's father, as a member of the tribe, in the *proceeds* of lands reserved from allotment was somewhat diminished by the making of an allotment to the heirs of Andrew J. Berryhill, and to the heirs of other deceased members of the tribe who came within Section 28 of the Original Creek Agreement, or Section 7 of the Supplemental Agreement. It is clear, however, that the pro rata share contributed by the father of Andrew J. Berryhill to the making of these allotments was infinitesimal. And the allotment to the heirs of Andrew J. Berryhill was only one of many made to the heirs of deceased members of the tribe under Section 28 of the Original Agreement, and Section 7 of the Supplemental Agreement. *De minimis non curat lex.*

It is clear that Andrew's father contributed no more to this allotment than did any other enrolled citizen of the tribe, whether Indian or freedman, and that he contributed no more to the making up of Andrew J. Berryhill's allotment than he did to the allotment of any other of the members of the tribe, whether of Indian or freedman blood to whose heirs allotments were made under the aforesaid provisions of the Original and Supplemental Creek Agreements. It is clear that, as a tenant in common, he contributed no more to the allotment of Andrew J. Berryhill than the heirs of Andrew J. Berryhill, also to be treated as a tenant in common, contributed to the father's allotment.

Not only were these several tenants in common of the lands out of which these allotments were carved not of the same family blood; they were not even of the same race. A portion of the members of the tribe were Indians by blood; the remainder (the freedmen) were of African race. Can it be said that an allotment carved for the heirs of Andrew J. Berryhill out of an estate held in common by the members of the tribe, most of whom were in no wise related to his father, and a large portion of whom were not even of the same race, was an ancestral estate coming to An-

drew J. Berryhill on the part of his father? Is there even any analogy between such an allotment and an ancestral estate? There is only one possible theory on which it could be contended with any show of reason that these allotments were made out of ancestral estates in common. That would be on the theory that the members of the tribe at the time these lands were acquired took as tenants in common *in equal shares,* and that upon the death of each member his interest descended to his heirs; that these heirs took what the original ancestor had, and nothing more. On this theory the proportionate shares of the members of the tribe living at the time of the allotment would have been unequal. The sole heir of one of the original members would own the entire share of his ancestor. The descendants of those of the original members who had been more prolific would of course have much smaller shares. This would necessarily be the case if the estates of the so-called tenants in common at the time of allotment should be treated as having descended to them from their respective ancestors. If this theory could be accepted, then it would necessarily follow that when allotments were equalized, those members of the tribe who

came of the more prolific ancestry, and whose proportionate shares would therefore be smaller, would receive a part only of their estate from their ancestors, the remainder being made up out of the shares of the other members of the tribe. As an illustration let us suppose that at the time the tribe acquired these lands there were 100 members, none of whom were related to each other, each holding as a tenant in common, an undivided 1-100 interest in the tribal lands. Let us suppose that at the time of the allotment one-half of these original members were represented by 100 descendants each and the other half of the original members were represented by one descendant each. In such a case it is apparent that if allotments should be equalized (as was actually done) the living representatives of the first class of original members would receive approximately only one-half of their respective shares by descent from their respective ancestors, the other half being made up out of the shares originally owned by the original members of the second class. Could it be said that the lands furnished by the descendants of the second class to equalize the allotments of their less fortunate fellow citizens were lands coming to such fellow citizens by descent from their ancestors? Clearly not.

The allotment to the heirs of Andrew J. Berryhill was made out of land to which the father of Andrew J. Berryhill had no claim whatever, except his pro rata share as a member of the tribe in the proceeds of the sale of the land in the event that, instead of being allotted to the heirs of Andrew J. Berryhill it should be reserved from allotment. Certainly it can not be said that this allotment came to the heirs of Andrew J. Berryhill "substantially" by descent from Andrew's father. It is conceded by counsel for defendant in error that technically the heirs of Andrew J. Berryhill took by purchase from the Creek Nation and the United States. In *Hill* v. *Heard*, 104 Ark. 23, 144 S. W. 254, 42 L. R. A. (N. S.) 446, Ann. Cas. 1914 C. 403, the Supreme Court of Arkansas, construing the identical statute here under consideration, held that an estate is not an ancestral estate, although the ancestor may have had an equitable estate in the land, where the intestate acquired the legal estate by purchase from another and any substantial portion of the purchase price of the land came from a source other than the ancestor. The question under consideration was the sole question involved in *Hill* v.

Heard; and we quote in full the opinion of the court delivered by Mr. Justice Frauenthal:

"This is an action of ejectment, instituted by appellee for the recovery of a tract of land situated in Conway County. It is conceded by both parties that the land was owned by one James Montgomery Heard (who, for brevity, will be hereafter referred to as Montgomery Heard), who died intestate and without issue, leaving his mother as his only surviving parent, who also died prior to the institution of this suit. The appellee claims that the land was an ancestral estate coming to said Montgomery Heard on the part of the father, and that she inherited it from him by reason of the fact she is his sole surviving paternal grandparent. The appellant claims that the land was obtained by Montgomery Heard as a new acquisition, and that the title passed to his half-brothers and half-sisters, who are appellant's children.

"The land was purchased by James B. Heard in January, 1894, from one Richard Brooke, at the price of $1,550, for which he executed four notes for the sum of $387.50 each, due, respectively, on the first of January, 1895, 1896, 1897 and 1898. At the same time Brooke executed to him a bond for title, by which he agreed to convey said land to him by deed upon the payment of said notes. Under said purchase, Heard went into possession of and occupied said land as his homestead until his death, which occurred on May 28, 1895. He died intestate, leaving surviving him his widow, Edna, and one child, the said Montgomery, who was then from three to four months old. In April, 1897, the widow, Enda,

married the appellant, Robert L. Hill, by whom she had six children. Montgomery Heard died intestate and without issue, in September, 1908, and his mother died in September, 1911. There is a conflict in the testimony relative to the question as to who paid the various notes executed by James B. Heard for the purchase money of the land. The testimony upon the part of the appellee tended to prove that the first maturing note was paid by the maker in his lifetime at or about its maturity, and that the other three notes were paid after his death by his widow, Edna, out of moneys derived partly from some personal property left by the said James B. Heard, and from a tract of land also left by the said intestate, which brought $150, and principally from the rents and proceeds of the crops made upon the land in controversy by the widow and those working for her. The testimony on the part of the appellant tended to prove that the last note was paid by the appellant out of his own money. But this testimony also tended to prove that he collected rents and profits of the land during the year in which he made the payment, which amounted to as much as said note. Upon the payment of the last note, the vendor, Brooke, in November, 1897, executed a deed by which he conveyed the land to said Montgomery Heard.

"The case was tried by the court sitting as a jury, who found that the land was an ancestral estate coming on the part of the father to said Montgomery Heard, and that, upon his death without issue and the death of his mother, the land ascended to his paternal

grandmother, and judgment was entered accordingly.

"The sole question involved in this case for determination is, What was the character of the estate acquired by Montgomery Heard in this land? That is, was it ancestral or a new acquisition? If it was an ancestral estate, coming by the father, then upon the death of the said Montgomery intestate and without issue, and the termination of the homestead interest of the mother by her death, the land ascended to his grandmother in the line of his father, in exclusion of his brothers and sisters of the half blood. On the other hand, if the land was a new acquisition, then upon the death of said Montgomery and his mother, the land passed by descent to his brothers and sisters of the half blood. Kirby's Dig., Secs. 2645-2647; *Kelly* v. *McGuire*, 15 Ark. 555.

"When the father, James B. Heard, purchased the land from Brooke and obtained from him a bond for title, he acquired an equitable estate in the land. The legal title to the land, however, was still in the vendor. The equitable estate thus obtained by a vendee is such an interest in land as will, upon his death, descend to his heir. As is said in 1 Pomeroy, Eq. Jur., Sec. 368, in speaking of the interest which a vendee under bond for title obtains in land: 'He may convey or encumber it, may devise it by will. On his death intestate, it descends to his heirs, and not to his administrators.' *Stubbs* v. *Pitts*, 84 Ark. 160, 104 S. W. 1110. It follows that upon the death of said James B. Heard the equitable estate in this land passed by descent to his sole child and heir, the said Montgomery, subject to the homestead rights of the widow

and of himself as minor. Thereafter Montgomery obtained the legal estate and title to the land by virtue of the conveyance executed to him by the vendor, Brooke. The question then arises as to how Montgomery obtained this legal title—whether by or on the part of his father, or by purchase—and, if by purchase, then the question recurs, what was the character of the estate which he then acquired when the equitable title and legal title to the land were thus united in him, the one by inheritance and the other by purchase? Was the land thus acquired ancestral or a new ecquisition?

"In the case of *Kelly* v. *McGuire, supra*, the entire subject of the descent of real estate as fixed by our statute was fully discussed and considered. The construction placed upon our statute of descent by that decision has been uniformly followed by this court, and the decision has become a rule of property. In considering the provision of the statute relating to ancestral estates, it was there said that its manifest intention was to preserve ancestral estates in the line of blood from whence they came. In speaking of this provision, the court said: 'It was a partial adoption or recognition of the common-law principle which invariably followed the line of the blood.' It has been the policy of our law, as evidenced by statutory enactments, to get away from the rules and canons of the common law relative to the descent of property. But the provision in our statute of descent relative to ancestral estates seems to have preserved to some extent a portion of such rules. At common law, after a failure of lineal descendants of the last

owner, the land, on account of feudal reasons, passed to his collateral relations, provided they were of the blood of the first purchaser by whom the land came to the intestate. 2 Bl. Com. 220; 2 Tiffany, Real Prop., Sec. 432. So, by this provision of our statute, if the land came to the intestate by gift, devise, or descent from an ancestor, it shall pass to such kindred only as are of the blood of the ancestor by or on the part of whom it was derived by him. In speaking again of this provision of the statute of descent relating to ancestral estates, this court, in the case of *West* v. *Williams*, 15 Ark. 682, said that, in order to carry out the intention of the legislature to preserve such estates in the line of the blood, 'the same means must be resorted to that were used at common law to make it effectual as to descended estates.' It will thus be seen that, in the interpretation of this section of the statute of descent, the court recognized it as a partial adoption of common-law principles, and considered it according to the rules of the common law relating to such succession. In order, therefore, to determine what is the rule of succession when the legal and equitable estate in land come from different channels and unite in the same person, we should resort to the same source for the interpretation of this phase of the statute. According to this, the descent of land is controlled by the legal title. The character of the estate in the holder, therefore, is determined by the course of the legal title coming to him. The leading case on this doctrine is *Goodright ex dem. Alston* v. *Wells*, 2 Dougl. K. B. 711, which was tried before Lord Mansfield, and in which it was held that, 'if the legal interest in land descended in fee sim-

ple *ex parte materna*, and the equitable interest in fee-simple *ex parte paterna*, or *vice versa*, the equitable estate shall merge into the legal, and both follow the line through which the legal estate descended.' The doctrine thus announced has been followed in this country. In the case of *Nicholson* v. *Halsey*, 1 Johns. Ch. 417, Chancellor Kent held that 'where the legal and equitable estates in land, being co-extensive, unite in the same person, the equitable is merged into the legal estate, which descends according to the rules of law.'

"In that case A, having paid money for the purchase of land, died before any conveyance was made, and B afterwards took a conveyance of the land in trust for the infant daughter of A, to whom he afterwards executed a deed in fee, and it was held that she acquired the legal estate by purchase, and, on her death without issue, the estate descended to her brothers and sisters of the half blood, to the exclusion of her paternal uncle. In Walker's American Law, 11th Ed. 409, the author says: 'In determining what is ancestral property the legal title controls. It is paramount to the equitable title. * * * Thus, if the legal and equitable titles come by separate channels to unite in the same person, the latter is merged in the former, and follows the course of descent that an exclusively legal derivation would have dictated.' In 27 Am. & Eng. Enc. Law, 2 Ed., 303, the rule is thus stated by the writer of the article therein, and this rule appears to be well sustained by the authorities there cited: 'Where the legal and equitable estate in the land comes through different channels, and in different modes, it has been held that it is the

course of the legal, rather than the equitable, estate which determines whether it be an ancestral estate in the holder.' *Selby* v. *Alston*, 3 Ves. Jr. 339, 4 Revised Rep. 10; *Wells* v. *Head*, 12 B. Mon. 166; *Shepard* v. *Taylor*, 15 R. I. 204, 3 Atl. 392; *Holme* v. *Shinn*, 62 N. J. Eq. 1, 49 Atl. 151; *Stembel* v. *Martin*, 50 Ohio St. 495, 35 N. E. 208; *Russell* v. *Bruer*, 64 Ohio St. 1, 59 N. E. 740. In the case of *Higgins* v. *Higgins*, 57 Ohio St. 239, 48 N. E. 943, the principle as to the determination of the succession of land wherein the legal and equitable titles have come to an intestate from different sources is thus stated: 'In determining questions as to the descent of real property, regard is had to the legal title only; and, where the legal title is acquired by purchase and the equity in the property by inheritance, the legal title and equitable interest at once unite, and, upon the death of the owner, the descent of the property will be cast as an estate which came by purchase.' In that case John Higgins agreed to sell James Higgins two hundred acres for $6,000, to be paid in installments, and deed to be made on payment thereof. Possession was delivered to the vendee, who afterwards died, leaving a widow and infant child, named Darlton, and also brothers and sisters. Afterwards the court required John Higgins to execute a deed to the said Darlton on the payment of the balance of the purchase money, amounting to $2,000. Darlton thereafter died intestate without issue, and it was there held that the land which he had thus obtained was a new acquisition and descended accordingly. See *Hogan* v. *Finley*, 52 Ark. 55, 11 S. W. 1035; *Wheelock* v. *Simons*, 75 Ark. 19, 86 S. W. 830.

"In the case of *Kelly* v. *McGuire, supra,* it was definitely determined when land was ancestral and when a new acquisition, but the consideration there was only of legal estates. It was there said that when land comes by gift, devise, or descent, either mediately or immediately from the father or mother or from any person in their respective lines, it is an ancestral estate; and where the land is acquired by the intestate by his own exertions and industry or is derived from any source other than descent, devise, or gift from father or mother, or any relative in the paternal or maternal line, then it is a new acquisition. It has, however, been held by this court that, in order to constitute land an ancestral estate it is not necessary that it come directly from the ancestor by deed or gift. It is sufficient to make the land ancestral if the ancestor advances the entire purchase money, and takes the deed in the name of his son. In the case of *Galloway* v. *Robinson,* 19 Ark. 396, it was held that 'where the father advances the money for the purchase of land and takes the deed in the name of the son, upon the death of the son without issue, the lands vest in the father in fee. In such case, the lands came to the son "on the part of the father" by gift, and were not a new acquisition by the son within the contemplation and meaning of the act of descent and distribution of this state;' and this ruling was recognized in the case of *Cotton* v. *Citizens Bank,* 97 Ark. 568, 135 S. W. 340. See also *Magness* v. *Arnold,* 31 Ark. 103. But in all these cases the legal title came from or on the part of the father, and with no consideration other than that coming from him. In the case at bar only the equitable title

came from the father, and the entire consideration of the land did not come from him. If the entire purchase money had been paid by the father, or had been paid by his administrators, out of his property, then, under the principle of the above cases the land would have come to the son by or on the part of the father. *Frick Coke Co.* v. *Loughead*, 203 Pa. 168, 52 Atl. 172. However, in this case the legal title came to the intestate, Montgomery, from Brooke; and if any substantial portion of the purchase money of the land came from any source other than the father, the land did not come by or on the part of the father to him. In such event, the equitable and legal title came to the son, Montgomery, by different modes and through different channels. The land came partly by title and consideration derived from a source other than by descent to the son from the father. The land was the homestead of the father, and, upon his death, the rents and profits arising therefrom became the property of his widow and minor child. Kirby's Dig., Sec. 3882; *Gainus* v. *Cannon*, 42 Ark. 503; *Smith* v. *Scott*, 92 Ark. 143, 122 S. W. 501. If it should be held that the rents of the land coming to the minor child were derived from the father, still the rents acquired by the widow became her separate property. The widow also became the owner of a portion, if not all, of the personal property left by the father. These rents and his personal property which came to the widow from the estate of James B. Heard became her absolute and separate property, and when this property of the widow or the proceeds thereof was paid on the land for the benefit of the son, it came to the son not from the father but from

the mother. According to the undisputed evidence, the rents and personal property which were thus owned by the mother were used in paying a great portion of the purchase money of this land. This portion of the consideration of the land came from a source other than from the father to the son. It follows, therefore, that the legal title to the land came to the son from a source other than from the father, and also that a substantial part of the consideration for the land, according to the undisputed evidence, came from a different source. In the case of *Martin* v. *Martin*, 98 Ark. 93, 135 S. W. 348, we said: 'In order to constitute a gift from a parent to a child, an ancestral estate within the meaning of our statute, the conveyance must be entirely in consideration of blood, and without any consideration deemed valuable in law; and, if such a deed is executed partly for a valuable consideration, the estate acquired is a new acquisition.' In like manner, in order for the land to be ancestral in coming by descent from the father, it must come wholly from the father, and without any pecuniary equivalent from any other source. If it comes in any other way, whether by purchase or gift, from a source other than from the father, then it is not an ancestral estate but a new acquisition.

"In the case at bar, one-fourth of the consideration for the land was paid by the father. After his death three-fourths of the purchase money was paid, and a great portion thereof was paid by the mother, and out of her separate property. This portion of the consideration did not come to the son by descent on the part of the father, or through his estate,

but came to him from the mother, and out of her separate property. The legal title obtained by the son from the vendor was acquired by a consideration obtained from a source other than from the father, and therefore by purchase, and not by descent. The two estates which thus united in the son came by different rights—the equitable estate by inheritance and the legal estate by purchase. The equitable estate, therefore, merged into the legal estate, and the rule of succession to the land must be determined solely by the course of the legal estate. The legal estate was not obtained by descent but by purchase, and the land acquired by the said Montgomery was, therefore, not ancestral, but a new acquisition. It follows that, upon the death of said Montgomery intestate and without issue, and the termination of the homestead right by the death of his mother, the land descended to his brothers and sisters of the half blood. The court erred in the judgment which it rendered.

"The judgment is accordingly reversed, and this cause is remanded for a new trial."

It will be noted that in *Hill* v. *Heard* some emphasis is laid upon the fact that not only the legal estate, but a substantial portion of the purchase money came from a source other than the ancestor, and the court declared that had the ancestor furnished all of the purchase money the result would have been different. This declaration of the rule that court would have applied had the ancestor possessed an equitable estate fully paid for, was of

course unnecessary to the decision of the case. As we shall hereinafter undertake to show, the source of the legal title would govern in the determination of the question of the ancestral character of the estate, regardless of the extent of the equitable estate of the ancestor. But it is submitted that it is so clear that no substantial beneficial interest in this allotment can be said to have come to the heirs of Andrew J. Berryhill through the father of the latter, that this declaration of the Arkansas court might be followed, and still there would be no ground for treating the allotment as an ancestral estate.

Before leaving this question we desire briefly to notice the argument of the defendant in error that while the title to the tribal lands was in the tribe as a political entity, and not in the individual members or citizens, nevertheless "the right of occupancy was in the individual citizens and enjoyed by them in severalty. The tribe as a political entity possessed the title, or possessed a base fee as stated by the opposing counsel. Nevertheless the use and occupancy of the tribal domain was held and enjoyed in severalty, and that part of the tribal domain occupied by a citizen consti-

tuting his home was descendible to his heirs, and when thus segregated from common occupancy constituted a right as sacred as the fee simple absolute title of the whites."

There are several answers to this argument. In the first place this right of occupancy was extinguished when the lands were allotted. In the next place there is no showing, we take it, that the father of Andrew J. Berryhill had any occupancy right in the particular land allotted to the heirs of Andrew J. Berryhill. It is to be presumed that if Andrew's father occupied any part of the tribal domain as his home, he selected this part for his own allotment, at least to the extent that the allotment act allotted to him.

Had Andrew J. Berryhill Lived to Receive his Allotment, He Would Have Taken the Same, as a New Acquisition, by Purchase from the United States and from the Creek Nation, Even if it be Assumed for the Purpose of the Argument that He Took an Equitable Estate Therein by Descent from His Tribal Parent, Because the Source of the Legal Title is the Controlling Factor in Determining Whether an Estate be a New Acquisition or an Ancestral Estate.

Assuming now for the purpose of argument only that all of the beneficial interest in the allotment to the heirs of Andrew J. Berryhill came by descent from the tribal parent of the said Andrew J. Berryhill the fact that the legal estate came to the heirs by purchase from the Creek Nation and the United States precludes the holding that said allotment is an ancestral estate. In *Kelly's Heirs* v. *McGuire's Heirs,* 15 Ark. 555, and again in *Hill* v. *Heard, supra,* it was declared that the statute regulating the descent of ancestral estates "was a partial adoption or recognition of the common law which invariably followed the line of the blood," and (quoting from *Kelly's Heirs* v. *McGuire's*) "the expressions 'come by the father' and 'come by the mother' or 'on the part of the father' or 'mother' mean the same thing. They are familiar to and derived from the common law,

having an appropriate, technical meaning, *which we must suppose the legislature intended to adopt.*"

It has been held by this court that the extension of the Arkansas statutes to the Indian Territory carried with them the construction theretofore placed thereon by the Supreme Court of Arkansas. *Robinson* v. *Belt*, 107 U. S. 41. The language of this statute "come by the father" and "on the part of the father," etc., having been construed before their extension to the Indian Territory as having the technical meaning of the same terms at common law, let us turn to the decisions for the purpose of ascertaining, if possible, what that meaning was as applied to this situation. In the first case in the Court of King's Bench in which this question arose, it was held that where the equitable estate descends from the father, and the legal estate in the same lands descends from the mother, the equitable estate merges in the legal estate, and the estate must therefore be held to be an estate coming on the part of the mother. The case to which we refer is *Goodright* v. *Wells*, 2 Douglas 771, decided in 1781. It will be noted in that case the father from whom the equitable estate descended had paid for the estate—

nothing came from the mother except the bare legal title. The decision is stated in the head-note as follows: "If the legal interest in land descend in fee-simple, *ex parte materna,* and the equitable interest in fee-simple *ex parte paterna,* or *vice versa,* the equitable estate shall merge in the legal, and both follow the line through which the legal estate descended." The facts are stated as follows:

> "James Selby, Serjeant at Law, agreed for the purchase of the estate in question and paid for it, but died before any conveyance was made of it to him, having by his will (made subsequent to the agreement) devised — 'All the rest of my real and personal estate whatsoever, and wheresoever, to my said wife in trust, that she do thereout educate and maintain my said son, until he shall attain the age of twenty-one years, and until he shall have sufficiently settled and secured to, and upon my said wife, what is to be settled upon and given to her as aforesaid, and afterwards in trust, to convey and dispose of all the then rest of my real and personal estate, and the produce thereof to my said son, his heirs, executors and assigns; but in case my said son shall die without issue, before he shall attain his said age of twenty-one years, then in trust, etc. * * *.'" After the testator's death a conveyance by lease and release of the estate in question was made to Mrs. Selby, the widow, who died before the son attained his age of twenty-one years, which he afterwards did at-

tain, and died in 1772, having been always in possession of the estate after the death of his mother, and having devised it to charitable uses, which devise was void by the Statute of Mortmain (a). The lessor of the plaintiff was his heir at law on the part of the mother, and the defendants his heirs at law on the part of the father's mother."

The principal opinion was delivered by Lord Mansfield. Justices Ashhurst and Buller fully concurred with Lord Mansfield, Justice Willes concurring on the ground that the action being at law the estate must be deemed to be an estate descending *ex parte materna*, but expressing the opinion that in equity a trust ought to be declared in favor of the heir *ex parte paterna*. We quote the opinion of Lord Mansfield:

"Serjeant Selby, after his purchase, was owner of the equitable estate, and had a right to go into Chancery to compel a conveyance. After his death the vendor conveyed to the widow, which conveyance on the condition of the son's living till twenty-one, and making a certain provision for her, was to be absolutely in trust for him. He outlived his mother, and on her death the trust estate was completely vested in him (the subsequent limitations in the will being on contingencies which never happened) and the legal estate descended to him from her. The question is, to whom the whole estate descended on the death of the son? for it did descend, the devise to char-

itable uses being void. If it descended from the mother, the lessor of the plaintiff takes an heir at law. But, it was contended that, though he is heir, there is a trust for the paternal heirs and it was said to be settled, that the court will not suffer a trustee to recover in ejectment, against the *cestui que trust.* When this was mentioned on the trial, I said, as I did the other day in the case of *Doe* v. *Pott* (a), that this rule is subject to the qualification of its being clearly the case only of a mere trust, for then, by taking notice of it, the court prevents delay and expense; but it will not decide when there is a doubt, but leave the question to a jurisdiction which regularly takes cognizance of matters of trust. The counsel said there might, perhaps, be cases on the subject, and the parties wished to have the opinion of the court. Now, who is to be considered as heir at law on this ejectment? It would be sufficient for the judgment which I shall deliver to say that it is not a clear case, that the lessor of the plaintiff is a mere trustee, for, that point being doubtful, he is entitled to recover at law, as he certainly has the legal right. But I will go farther, and throw out some observation, to show that it is not only doubtful, but that the inclination of my opinion is that you can not support such a trust. A case so circumstanced, in every particular, probably never existed and, perhaps, never may happen again. But, cases must often have happened on which the general question would arise, viz: Whether when *cestui que trust* takes in the legal estate possesses under it, and dies, the legal and equitable estate shall open on his

death, and be severed for the different heirs? Consider it, first, upon authority; and, secondly, upon principle. 1. No case has ever existed where it has been so held, none where the heir at law of one denomination has, on the death of the ancestor, been considered as a trustee for the heir at law of another denomination, who would have taken the equitable estate, if that and the legal estate had not united. 2. On principle, it seems to be impossible; for the moment both meet in the same person, there is an end of the trust. He has the legal interest in all the profits, by his best title. A man can not be trustee for himself. Why should the estates open upon his death? What equity has one set of heirs, more than the other? He may dispose of the whole as he pleases and, if he does not, there is no room for chancery to interpose, and the rule of law must prevail. The case in the Common Pleas is an authority, if it went on this ground, and I am told it did. There the *cestui que trust* taking the legal estate as a purchaser, the descent was altered. *Quacunque* via data therefore, the lessor of the plaintiff is entitled. If the question is doubtful then, in this court, the legal right must prevail; and if the weight of opinion and argument is that the legal estate must draw the trust after it, the case is still stronger against the defendants."

A bill in chancery was afterwards filed by the paternal heir against the maternal heir. The decision in the equity case is reported under the

style of *Selby* v. *Alston*, in 3 Ves. Jun. 339. It was held by the Master of the Rolls (Sir. R. P. Arden), following what was held to be the opinion of Lord Thurlow, (as stated in the head note): "Where the equitable and legal estates, equal and co-extensive, unite in the same person, the former merges; therefore where the former descends *ex parte paterna*, the latter *ex parte materna*, upon their union the paternal heir has no equity."

The leading American case on this question is *Nicholson* v. *Halsey*, 1 Johns. Ch. 417, decided by Cancellor Kent in 1815. It was held, as stated in the syllabus, that:

> "Where the legal and equitable estates in land, being co-extensive, unite in the same person, the equitable is merged in the legal estate, which descends according to the rules of law.
>
> "Thus, if the legal estate in fee descend, *ex parte materna*, and the equitable estate in fee, *ex parte paterna*, the equitable estate is merged in the legal, and both go in the line of descent of the legal estate.
>
> "As where A, having paid money for the purchase of land, died before any conveyance was made, and B, afterwards, took a conveyance of the land in trust for the infant daughter of A, to whom he afterwards executed a deed in fee, she was held to have acquired the legal estate by purchase; and on her death

without issue, the estate descended to her brothers and sisters of the half-blood, to the exclusion of her paternal uncle."

In the opinion of the court it is said:

"This is a claim to the inheritance made by the paternal uncle of Eliza B. Nicholson, against her brothers and sisters of the half-blood.

"The statute of descent says that brothers and sisters of the half blood shall inherit equally with those of the whole blood, unless the inheritance come by descent, devise, or gift, of some ancestor of the person dying seised, in which case all who are not of the blood of such ancestor are excluded.

"Eliza B. Nicholson died in infancy, seised in fee of a moiety of 4,000 acres of land in Chemung, and of the whole of lot No. 24, in Romulus.

"The testimony is conclusive that John Cantine, in his lifetime, conveyed to her the moiety of the Chemung lands. This conveyance was afterwards delivered back to Cantine by her mother, and new deeds taken to the infant and her mother, of the same lands, in separate and unequal portions. The first deed is supposed to have been destroyed after it was delivered up, and it cannot now be found. This subsequent surrender and destruction of that deed could not divest the infant of the estate of which she was seised under that deed, and she must have transmitted, by descent, her interest in the same, unimpaired, to her heirs at law. This is a clear and undeniable proposition; and as she is to be considered as

having acquired the legal estate by purchase the question is, whether this court can now, in aid of the heir, *ex parte paterna*, take notice of the equitable title to those lands which she inherited from her father, and which was afterwards united with the legal estate by means of the conveyance from Cantine? It may be laid down as a settled principle, that when the legal and equitable estates (being co-extensive) unite in the same person, the equitable estate is merged in the legal, and may be said no longer to exist for the purpose of being recognized and acted upon by this court. The legal estate is left to prevail according to the rules of law. The existence and truth of this principle has been frequently declared, both in courts of law and equity. Thus, in *Goodright* v. *Wells* (Doug. 771), it was acknowledged that, if the legal interest descend in fee, *ex parte materna*, and the equitable interest in fee, *ex parte paterna*, the equitable estate merges in the legal, and both follow the line through which the legal estate descends; and the court held that, after such union, the legal and equitable estates should not open on the death of the person so seised, and be severed for the claim of different heirs. The judges said there was no such case in law or equity, and there was no reason for it; for the moment both estates met in the same person, there was an end of the trust, as a man could not be a trustee for himself. And, to use the language of Lord Mansfield, 'why should the estates open at his death? What equity has one set of heirs more than the other? The legal estate draws the trust after it, and the latter is not to be revived so as to make the

heir at law of one denomination a trustee for the heir at law of another denomination, who would have taken the equitable estate, if that and the legal estate had not united. There is no room for chancery to interpose, and the rule of law must prevail.'

"The case of *Doe* v. *Pott*, cited from the C. B., was considered by the K. B. as having established the same doctrine, and to have ruled that the *cestui que trust*, taking the legal estate from the trustee, as a purchaser, thereby altered the course of descent.

"The principle advanced in the case from Douglas's Rep. was afterwards sanctioned by Lord Thurlow, in *Wade* v. *Paget* (1 Bro. 364), and by the master of the rolls in *Philips* v. *Brydges* (3 Ves. 126, 127), and again, in *Selby* v. *Alston* (3 Ves. 339). This last case arose on a bill by the paternal heir, claiming the estate as heir of the equitable title, against the heir on the maternal side, who was in possession, and claimed as the heir to the legal estate. The case is much in point, and presses strongly on the one before us. The court there held that after the union of the equitable and legal estates in the same ancestor, the former was absorbed and gone; and the bill was dismissed because the paternal heir had no equity.

"The plaintiff then, under the authority of these cases, and the principle which they so clearly and so rationally establish, has no claim to the assistance of the court in respect to the Chemung lands. There can be no doubt that the infant *cestui que trust*, by means of the conveyance from Cantine, the trustee, took the

legal estate as purchaser; and, consequently, if the legal and equitable estate, so united by that purchase, were not afterwards severed and revived by her own act, and cannot be considered as opening at her death, she must have transmitted the entire inheritance by descent to her brothers and sisters of the half blood.

* * * * * * * *

"In every view which I have been able to take of this case, I think the plaintiff fails; and his bill must be dismissed, with costs.

"Bill dismissed."

These leading English and American cases declare a rule which has been generally accepted by the American courts. The decisions of other courts on the question are collated in the notes to the case of *Hill* v. *Heard* in 42 L. R. A. (N. S.) 446, and Ann. Cas. 1914 C. 403. It is also held by the weight of authority that the course of descent of an ancestral estate may be diverted from the blood of the ancestor, so that it will descend to the heirs of the holder generally, by conveying the same to a third person, and taking a reconveyance. It is shown by these cases that upon such conveyance and reconveyance the estate is held as an estate by purchase by virtue of the reconvey ance; that this doctrine does not work a fraud upon the heirs of the blood of the ancestor, because the

holder of the estate has the legal right to sell it or give it away, thereby disappointing such expectant heirs. The cases on this question are collated in notes to the case of *Dudrow* v. *King*, in 39 L. R. A. (N. S.) 955, and Ann. Cas. 1913 E. 1259.

On the authority of the cases we have cited it is most respectfully urged that the fact that the legal title came to the heirs of Andrew J. Berryhill by conveyance from the Creek Nation and the United States is conclusive of the character of the estate as a non-ancestral estate.

As we interpret the decision of this court in *Sizemore* v. *Brady*, 235 U. S. 441, this court there treated these allotments as non-ancestral estates. Not only did the court there reject the theory of ownership of the tribal lands by the members of the tribe, either severally or as tenants in common, prior to allotment, but it was there held that under chapter 49 of Mansfield's Digest the paternal cousins took the allotment to the exclusion of the maternal cousins, who were related to the deceased in the same degree. In that case both of the parents of the deceased were Creek citizens by blood. Had this court accepted the doctrine of *Shulthis* v. *McDougal* as sound it would necessarily

have been held that the allotment went, one-half to the paternal cousins, and the other half to the maternal cousins.

Andrew J. Berryhill Having Died Prior to the Enactment of the Legislation Authorizing the Making of an Allotment to His Heirs, and No Estate, Therefore, Having Vested in Him, said Allotment was not an Acquisition, New or Otherwise, in Andrew J. Berryhill; Hence the Allotment did not Descend to his Heirs Either as an Ancestral Estate or as a New Acquisition, Under Section 2531 of Mansfield's Digest, but Vested in His Heirs, Under Section 2522 of Mansfield's Digest, by Direct Grant from the United States and the Creek Nation, Becoming a New Acquisition in Said Heirs.

Andrew J. Berryhill was born in the month of May, A. D. 1901. Not having been born until after July 1, 1900, he was not entitled to enrollment under section 28 of the Original Creek Agreement. He died in the month of November, 1901. It was not until after the death of the said Andrew J. Berryhill that provision was made for an allotment to his heirs, by section 7 of the Supplemental Creek Agreement, which was approved June 30, 1902. It is insisted, however, by plaintiff in error that the allotment made to his heirs must be treated as a new acquisition *in Andrew J. Berryhill.* We insist that this allotment was not a new acquisition in Andrew J. Berryhill, but was a direct grant by the Creek Nation and the United States to the heirs of Andrew J. Berryhill, and must therefore be treated as a new acquisition in the

heirs and not in Andrew J. Berryhill. That the grant was made to and the *acquisition* was by the heirs of Andrew J. Berryhill to us seems clear. The language of section 7 of the Supplemental Agreement is: "And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs as herein provided, and be allotted and distributed to them accordingly."

There can be no grant without a grantee, and this act does not purport to accomplish the impossible. It says that the lands shall be *allotted* to the heirs. Andrew J. Berryhill having died before the act was passed, it is clear that he had no estate thereunder, and that his heirs inherited nothing from him. They took, by virtue of the statute, an estate in lands which, until it was conveyed to them, was the property of the Creek Nation, and in which Andrew J. Berryhill had acquired no interest. We rely upon the decision in *Hall* v. *Russell*, 101 U. S. 503, and kindred cases which are sufficiently discussed in the brief of Mr. Meserve in support of our position that under the statute the heirs of Andrew J. Berryhill acquired an estate by

grant from the Creek Nation, and not by descent from Andrew J. Berryhill. It is true that the statute says that the lands shall "descend" to the heirs of the deceased allottee, but it also says that they shall be allotted to such heirs, which language clearly contemplates the conveyance thereof to the grantees by patent from the Creek Nation. The word "descend," therefore, can not be given a literal or technical interpretation.

Section 7 of the Supplemental Agreement provides that allotments made thereunder shall descend and be allotted "as herein provided." This reference is to section 6, which repeals "the provisions of the act of Congress, approved March 1, 1901, in so far as they provide for descent and distribution according to the laws of the Creek Nation," and enacts that "the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas * * * " This statute points out no particular section of chapter 49 as determining who are the heirs who shall take allotments. That is left to be determined by the application of the rules of descent prescribed by chapter 49 of the particular case. In the case at bar, if Andrew J. Berryhill was seised

of an ancestral estate, or of a new acquisition in the allotment, which a law enacted after his death provided should be made to his heirs, then it must be held that his heirs are named by section 2531 of Mansfield's Digest. We think it is clear that Andrew J. Berryhill was not seised of such lands as an ancestral estate. He had not acquired the lands, so certainly they can not be said to be a new acquisition in Andrew J. Berryhill. He had departed this life and become incapable of acquiring or taking any estate long before this allotment was selected, and even before the law was passed which authorized the making of the allotment to his heirs.

Section 2531 (Sec. 10 of Chap. 49) of Mansfield's Digest is one of the sections of the chapter which were declared by the court in *Kelly's Heirs* v. *McGuire's Heirs* to be applicable to *real estate* alone. The following excerpt from the opinion of the Supreme Court of Arkansas in that case is quoted on page 18 of plaintiff in error's brief: "The 1st, 4th, 5th, 15th, 16th, 17th and 18th sections *are the only ones* designated, in our opinion, to apply to both *real estate* and *personal estate*. All the rest embrace real estate alone."

Can it be said that Andrew J. Berryhill acquired the allotment made to his heirs as "real

estate." Section 2540 of Mansfield's Digest reads as follows: "The term 'real estate,' as used in this act, shall be construed to include every estate, interest and right, legal and equitable, in lands, tenements and heriditaments, *except such as are determined or extinguished by the death of the intestate,* seised or possessed thereof in any manner other than by lease for years and estate for life of another person." Can it be said that Andrew J. Berryhill was seised of an estate in this allotment to his heirs, which was not determined or extinguished by his death? Had Andrew J. Berryhill any rights at all in this land? This court said in *Sizemore* v. *Brady*: "There was nothing in the agreement indicative of a purpose to make a grant in *praesenti.* On the contrary, it contemplated that various preliminary acts were to precede *any investiture* of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them."

Clearly Andrew J. Berryhill had no estate and no right of any kind. If the fact that he died before the passage of the Supplemental Agreement could be ignored and it could be held that he had a "right" to have an allotment made to

him, such "right" would be "a mere float." *Woodbury* v. *United States,* 170 Fed. 302. A land certificate, for public lands in Texas, while it "symbolizes the right to acquire land, is yet but personal property." *Barker* v. *Swenson,* 66 Tex. 408, 1 S. W. 117; *Collins* v. *Durwood,* 23 S. W. 561, 4 Tex. Civ. App. 389.

Andrew J. Berryhill, having no estate at all, and certainly having no real estate, it can not be said that his heirs are to be determined under a section of the statute, which was construed by the Supreme Court of the State of Arkansas to apply to *real estate alone,* especially in view of the fact that the court declared in *Kelly* v. *McGuire* that the first section of the statute (Sec. 2522) "is to be considered as the general table of descent." The first section, it will be remembered, is one of the sections which the court declared to be applicable to personal estate as well as to real estate. This general table of descent designates the heirs of intestates generally. Section 2531 merely designates the descent of real estate, not including such interests and rights "as are determined or extinguished by the death of the intestate." Hence we can not look to this section as applicable to this case. We must look to section 1, not because

Andrew J. Berryhill had even a personal right or estate in this land, but because that section furnishes the general table of descent. If we look to the first section (Sec. 2522, Mans. Dig.) we find the table of descent which determines the heirship in this case. This section is quoted in full at page 11 of the brief of plaintiff in error.

Referring to the first section, the court said in *Kelly* v. *McGuire*, "by that section, as already remarked, real and personal estate goes in the same channel, *and if no subsequent provisions had been introduced, touching real estate,* the precise bearing of which it is probable the rivers (revisors) did not perceive, our labors would have been comparatively easy." And again in this opinion it is said: "The first section is general and comprehensive, embracing all lands, whether ancestral or newly acquired, *subject to certain exceptions* and qualifications hereafter particularly noticed, and these exceptions refer to *real estate alone.*"

In onclusion it is respectfully submited that had Andrew J. Berryhill lived to acquire an allotment it would have been a new acquisition and not an ancestral estate in him; but that, having died before he acquired an allotment or even the right to an allotment, the allotment must be held to be a

new acquisition in his heirs as grantees of the Creek Nation and of the United States; that these heirs are not determined by the application of a section of the statute having application only to the descent of estates, rights and interests in real estate, which are not determined or extinguished by the death of the intestate, but the heirs to whom the allotment inures under the statute are to be determined under the general table of descent, viz: Sec. 1 of chap. 49 (Sec. 2522) of Mansfield's Digest.

Respectfully submitted,

E. G. McAdams,
Norman R. Haskell,
Amici Curiae.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 676.

DANIEL A. McDOUGAL, - - - *Plaintiff in Error,*

vs.

EDMOND McKAY, et al., - - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF, *AMICUS CURIAE.*

The questions involved in this case are of high importance. The observations submitted by this brief relate solely to the question of the devolution of the lands in controversy.

First Proposition.

The lands allotted and with which we are concerned in this case were allotted and conveyed by the United States and the Creek Nation directly to "the heirs of Andrew J. Berryhill, deceased," and such heirs acquired title to said lands by purchase and not by descent.

The provisions of Sections 6 and 7 of the Act of Congress of June 30, 1902 (32 Stat. L. 500), known as the Supplemental Creek Treaty, as are follows:

> "*Sec. 6.* The provisions of the act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided,* That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: *And provided further,* That if there be no person of Creek citizenship to take the descent and distribution of said estate then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."
>
> "*Sec. 7.* All children born to those citizens who are entitled to enrollment, as provided by the act of Congress approved March 1, 1901 (31 Stat. L. 861), subsequent to July 1,

1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

Andrew J. Berryhill was born on the 6th of May, 1901, and died in November, 1901. In October, 1902, George Franklin Berryhill, the father, procured the name of his deceased son to be placed upon the approved Creek roll, and in April, 1904, filed on the land in controversy. In October, 1904, three years after the death of Andrew J. Berryhill, a deed was executed containing the provisions that "whereas there has been allotted to the heirs of Andrew J. Berryhill, a deceased Creek Indian," etc., there is hereby "granted and conveyed unto the heirs of Andrew J. Berryhill, a deceased Creek Indian," the lands in controversy.

Andrew J. Berryhill was enrolled as a member of the Creek tribe by virtue of the terms of Section 7 *supra,* and the distribution of the lands involved herein was made in accordance with the same section.

It will be observed that at no time during his life time was Andrew J. Berryhill entitled to enrollment as a citizen of the Creek Nation, and at no time

did he ever have the least vested right, title or interest in or to any of the land of the Creek Nation.

The enrollment of Andrew J. Berryhill was made under an Act of Congress that was passed after his death, and the same is true concerning the allotment of lands, and it is respectfully submitted that under the deed or patent to the heirs in this case the heir as allottee takes his title by purchase directly from the United States and the Creek Nation.

A quite complete analogy is found in the decisions of the state and federal courts interpreting the homestead laws of the United States. In *Towner* v. *Rodegeb,* 74 Pac. 50, the Supreme Court of Washington held that the heirs of an entryman did not acquire their rights from their ancestors by succession, but because the law gave them preference as new homesteaders. See also,

Gould v. *Tucker* (S. D.) 100 N. W. 427, 105 N. W. 624;
McCune v. *Essig,* 122 Fed. 588.

So in the instant case the heirs acquired the estate not by succession but in their own right as allottees, the right being given them by statute subsequent to the death of the ancestor, and the land in the hands of the heirs comes directly from the United States and the Creek Nation.

In the case of *Warnell* v. *Finch,* 15 Tex. 163, the Supreme Court of Texas considered a question al-

most, if not, identical with the one under consideration here, to-wit, an Act of the Republic of Texas entitled "An Act for the Relief of the Heirs of Those Who Fell with Fanning, Ward, Grant and Johnson, during the War with Mexico in the Years 1835 and 1836." The patent to the land in question was issued in 1841 to the "heirs of Henry Warnell." The laws in force in Texas at the time the title passed contained an inhibition against alien heirs holding real estate coming by descent, and Henry Warnell left surviving him one heir, and that heir was an alien. The court in its opinion said:

> "How then does the heir hold in the case before us? Not through his ancestor, but he is the immediate grantee of the Government. His ancestor had no right or title to descend to him. The Government grants the land to the alien heir directly."

So we submit in the case at bar that the deceased, Andrew J. Berryhill, having at no time any right or title to descend, his heir takes directly from the United States and the Creek Nation as an allottee.

There are two modes of acquiring title to real estate, namely, by descent and by purchase. The only necessary requisite of title by descent is that the ancestor must be seized of the estate at the time of his death.

> "We must also remember that no person can be properly such an ancestor as that an in-

heritance of lands or tenements can be derived unless he hath had actual seizin of such land, either by his own entry or by the possession of his own or his ancestor's lessee for years, or by receiving rent from the lessee of the freeholder; or unless he hath had what is equivalent to corporeal seizin in hereditaments that are not incorporeal * * * but he shall not be accounted an ancestor who hath had only a bare right or title to enter or be otherwise seized. And therefore all the cases which will be mentioned in the present chapter are upon the supposition that the deceased (whose inheritance is not claimed) was the last person actually seized thereof."

—II Blackstone Com., p. 209.

And again, purchase is thus defined by Littleton:

"The possession of lands and tenements which a man had by his act or agreement and not by any of his ancestors or kindred. In this sense it is contra-distinguished from acquisition by right of blood and includes every other method of coming to an estate but merely by inheritance, wherein a title is vested in a person not by his own act or agreement but by the single operation of law."

—II Blackstone Com., p. 240.

And again, in Washburn on Real Property, Vol. 3, p. 4, the principle is laid down in these words:

"In one thing all writers agree, and that is in conceding that there are two methods only regarded as classes of acquiring a title to land; namely, descent and purchase; purchase including every mode of acquisition known to law ex-

cept that by which an heir on the death of an ancestor becomes substituted in his place as owner by the act of the law."

The language "descend to the heirs," incorporated in section 7, *supra,* cannot be said to disclose an intention on the part of Congress that the title to these lands shall be considered by descent and not by purchase. The word "descend" has a well defined meaning in the common law and in our statute law. The essentials for a title by descent must exist to enable lands to descend, and when the word "descend" is used in a statute where it is not technically applicable, the courts will not shape the statute to fit the word, but will give to the word a non-technical meaning as "to go to," "to go down," "to vest in," "to pass," "to inure."

—*Tate* v. *Townsend,* 16 Miss. 316, 319;
Johnson v. *Norton,* 10 Pa. St. 245;
Borgner v. *Brown,* (Ind.) 33 N. E. 92;
Starr v. *Hamilton,* 22 Fed. Cas. 1107.

If the lands in controversy are to be considered as having come by descent for one purpose, they certainly must be considered as having come by descent for all purposes. Suppose in the present case that Andrew J. Berryhill died leaving certain judgments obtained against him or certain debts provable against his estate. Would it be contended that the lands in controversy in the hands of the heirs or administrator would be subject to sale for the satisfaction of such judgments or the payment of such

debts? Certainly not. Such a contention, however, is fully set at rest by this court in the recent case of *Sizemore* v. *Brady*, 235 U. S. 441, decided on December 21, 1914, wherein the court said:

> "The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was neither alienable nor descendible."

See also:

Hayes v. *Barringer*, 168 Fed. 221;
Cook v. *Childs*, (Okla.) 145 Pac. 406.

It cannot be said that even though the heirs in this case acquired title by purchase that Congress did not recognize the distinction between lands coming to "heirs" by descent and lands coming to "heirs" by purchase. This distinction was recognized in section 7, *supra*, and in section 5 of Act of Congress approved April 26, 1906 (34 Stat. L. 137), this latter section being as follows:

> "That all patents or deeds to allottees of any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein *shall inure to and vest in the heirs*, and in case any allottee shall die after restrictions have been removed, his property shall *descend to his heirs* or his lawful assigns as if the patent or deed had issued to the allottee during his life, and all patents hereto-

fore issued where the allottee died before the same became effective shall be given a like effect. * * * "

The effect of this section is to vest in the heirs title to the lands claimed by them, even though patent issued after the date of the death of the Indian himself. It is asserted that Congress and the Creek Nation recognized no distinction between "allottees" and that an "allotment to the heirs" should in all respects be considered the same as an allotment made to an enrolled, living, individual member of the tribe.

Andrew J. Berryhill could not qualify as an allottee because at no time during his lifetime was he entitled to enrollment or allotment, and it was not until about a year after his death that the act was passed authorizing the allotment to be made to his heirs.

The Department of the Interior, being charged in its administration of the Indian Affairs in Oklahoma with the interpretation and enforcement of the various Acts of Congress relating thereto, had occasion in a matter before it on July 13, 1908, to construe this question. The following quotation is from the opinion of the Secretary of the Interior in the above matter, known as the *Malissa Wiley* case, as follows:

> "There cannot be a grant unless there is a grantee and consequently there cannot be a present grant unless there is a present grantee. (See

case of *Hall* v. *Russell,* 101 U. S. 503.) Adhering to this principle, it must be held that persons dying prior to May 25, 1901, who were entitled to enrollment if they were living April 1, 1899, are to be considered as units of allotment and distribution, and the interest such persons would have received had they lived passed by virtue of said acts to others.

"Martha Wiley was living on April 1, 1899. She died long before the Act of March 1, 1901, became effective. Malissa Wiley was her nearest relative and became the qualified grantee, and she took the allotment that would have been the property of Martha Wiley had she lived, *not by virtue of inheritance but by grant from the Creek Nation,* in accordance with the Act of Congress referred to which was ratified by the Creek Council. * * *"

In the case of *Hall* v. *Russell,* 101 U. S. 503, this court had under consideration a similar question to the one involved herein. The suit arose over an Act of Congress known as "The Oregon Donation Act" (9 Stat. L. 496). That act provided for the settlement of lands in Oregon Territory; that a single man could take up 320 acres and a married man 640 acres; that at the end of twelve months' occupation the settler must make proof of settlement, and that the land must be occupied and cultivated for four years, etc., and that when all of the provisions of the act had been complied with, a patent should issue. Section 8 of the act provided:

"That upon the death of any settler before the expiration of four years' continued posses-

> sion, all the rights of the deceased under this act shall descend to the heirs at law of such settler, including the widow where one is left, in equal parts, and proof of compliance with the conditions of this act up to the time of the death of such settler shall be sufficient to entitle them to a patent."

Under this act, in the above paragraph, one Loring, a single man, in 1852 settled on the land in dispute. He lived on the land one year and died, leaving a will whereby he devised his estate to one Hall. On the death of Loring certain parties by the name of Delays, husband and wife, claimed the land as settlers. The heirs of Loring, the devisee, Hall, and the Delays all claimed the land. The patent was finally issued to the heirs of the Delays. The question presented was: Whether the heirs of a settler under the Oregon Donation Act, who died before the expiration of the four years' residence as required, took by descent from the settler or as donees of the United States. In other words, the question presented was: Are the heirs to be considered as having taken by purchase or by descent?

The Circuit Court, in passing on the phrase "shall descend to the heirs at law," said:

> "The word 'descent' as here used, means nothing more than pass or go."
>
> —11 Fed. Cas. 251.

On appeal the Supreme Court of the United States sustained the decision of the Circuit Court,

and held that the heirs did not take title by descent, but as purchasers or donees of the United States. Chief Justice WAITE, in delivering the opinion of the court said (101 U. S. 503, 25 L. ed. 829):

> "For the purpose of the present suit it is enough to show that the occupant got no title himself beyond that of a mere right of possession, until he had completed his four years' continued residence and cultivation. * * * There was no grant of the land to a settler until he had qualified himself to take as grantee by completing his four years' residence and cultivation. * * *
>
> "As the law required full four years' residence by the person who claimed the grant, if no provisions had been made for a continuance of his possession the land would have become vacant on his death and open for a new settlement by a new settler, if the law authorizing new settlements still remained in force. Hence, it was provided that the possessory rights of a deceased settler should *go* to his heirs, and that they might get the land on making the requisite proof, without further residence and cultivation of their own. Their title to the land was to come, not from their deceased ancestors, *but from the United States.* The title, it is true, was granted to them by reason of the possessory rights of their ancestors, but these were rights which they could not transfer, and which passed to them under the statute without any act of his. On his death, his heirs became qualified grantees. Whether they took immediately on his death or after proof of his compliance with the provisions of the act while in life, need not be decided. It is enough for this case that when

the ancestor died he had nothing in the lands which he could transmit to them, and that what they afterwards got came from the United States and not from him. All his rights in the land were dependent on his completion of the four years' possession, but in consideration of what he had done, Congress made his heirs the special objects of its bounty, if he died before his own grant had been secured. *We attach no importance to the word 'descend' as used in this section. In section 4 the word selected to convey substantially the same idea was 'entitled.'* The thing done was to give the heirs of a settler the benefit of his rights and to designate them as recipients of the bounty of the government instead of him."

This case, we submit, destroys a contention that the use of the word "descend" in the above quoted act of Congress, approved June 30, 1902, shows an intent that the lands in question are to be considered as if they had come to the heirs by descent.

The Legislature of the Territory of Oregon, subsequent to the passage of the Oregon Donation Act, enacted a law the purpose of which was to make the heirs, in cases similar to the case of *Hall* v. *Russell*, take by descent and not by purchase. This law was, however, declared a nullity by the federal courts as in conflict with the Act of Congress.

—*Hershberger* v. *Blewett*, 55 Fed. 170.

In the case of *McKee* v. *Henry*, 201 Fed. 74, the United States Circuit Court of Appeals for the Eighth Circuit decided the question. Hugh War-

den, a duly enrolled Creek citizen died in November, 1899. Though entitled to an allotment of land no selection was made for him prior to his death. Section 28 of the Original Creek Agreement of March 1, 1901, provided for such a contingency and directed that if such citizen were living on April 1, 1899, and should die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, should descend to his heirs according to the laws of descent and distribution of the Creek Nation and be allotted to them accordingly. No selection was made for him until November 12, 1902. In the meantime on June 30, 1902, the Creek Supplemental Agreement (32 Stat. L. 500), amended section 28 of the Original Creek Agreement by providing that the descent should be according to chapter 49 of Mansfield's Digest of the Laws of Arkansas, instead of the Creek law of descent. The court was called upon to decide whether the land descended according to the law in force at the date of the death of Hugh Warden or the law in force at the time of the allotment.

The Circuit Court of Appeals held that when Hugh Warden died he was seized of no inheritable estate in the lands of the Creek Nation and that there was no estate to descend until allotment, which descended according to the law of descent then in force. The court said:

"When the allotment was made, for the

> first time the rights of any individual vested, and the title became vested in the one at that time fixed by law, and it makes no difference what previous laws may have provided."

In a recent opinion by this court in *Franklin* v. *Lynch*, 233 U. S. 505, the court had under consideration a deed made by Emmer Sisney, an intermarried member of the Choctaw Tribe of Indians, by which she undertook, on October 16, 1905, before allotment, to convey her "entire interest in any and all lands, exclusive of homestead, which might be finally allotted to her by the Commissioners to the Five Civilized Tribes." Though her deed was made after the Act of April 21, 1904 (33 Stat. L. 189), which removed the restrictions on the alienation of lands of allottees of the class to which she belonged, it was held that she had nothing before allotment that she could sell. The court said:

> "As the tribes could not sell, neither could the individual members, *for they had neither an undivided interest in the tribal lands nor vendible interest in any particular tract.*"

In *Woodbury* v. *United States*, 170 Fed. 302, the Circuit Court of Appeals of the Eighth Circuit characterized the right of an Indian long after his enrollment but before allotment as "a mere float—giving him no right to any specific property."

Second Proposition.

George Franklin Berryhill, as the father of Andrew J. Berryhill and as the heir nearest in the line of succession to Andrew J. Berryhill, acquired, under the laws of descent of the State of Arkansas, an estate in fee simple in the lands in controversy.

This proposition is the natural sequence of the preceding one.

Section 6, of the Creek Supplemental Agreement, *supra,* places in force in the Indian Territory chapter 49 of Mansfield's Digest of the Statutes of Arkansas. Section 7 of the same act is the one in which the enrollment and allotment under consideration was made. Pursuant to this section, the land in controversy was allotted to the heirs of Andrew J. Berryhill, and the patent issued to said heirs. The patent recites that the allotment was made to the heirs, and the conveyance was made to the heirs without expressly naming them. It is submitted by the writer of this brief that the heirs, if more than one existed, would all take equally. The word "heirs" defines the grantees as a class; it is a description of person or persons who take under the patent; and if more than one, would take equally, regardless of the shares or proportions they would have taken had the title come to them by descent. This proposition is supported by

Auman v. *Auman,* 21 Pa. St. 348;
Ward v. *Stowe,* (N. C.) 27 Am. Dec. 239;

Brown v. *Belmarde,* 3 Kan. 40;
Gould v. *Tucker,* (S. D.) 105 N. W. 624;
Cooper v. *Wilder,* (Cal.) 43 Pac. Rep. 591;
Wittenbrook v. *Wheadon,* (Cal.) 60 Pac. Rep. 664.

In *Auman* v. *Auman, supra,* the Supreme Court of Pennsylvania said:

> "We do not perceive the distinction taken by counsel of the plaintiff in error between the phrase 'their heirs' and 'heirs of them.' The legal, as well as the grammatical meaning of both is the same. The one means children or issue no more than the other. In the case cited, the word heirs was necessarily a word of purchase because neither of the ancestors took a preceding estate. Being a word of purchase, it was by the same necessity *descriptio personae,* and no one could take who did not meet the description of a right heir to both ancestors."

Under the provision of section 6, above quoted, we must look to the Arkansas law to determine who can qualify as an heir to Andrew J. Berryhill, and section 1 of chapter 49 of Mansfield's Digest of the Statutes of Arkansas (M. D., section 2522), points out the general line of succession, and is as follows:

> (1) *Section 2522.* "When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the pay-

ment of his debts and the widow's dower, in the following manner:

First. To children or their descendants, in equal parts.

Second. If there be no children or their descendants, then to the father, then to the mother; if no mother, then to the brothers and sisters or their descendants, in equal parts.

Third. If there be no children, or their descendants, father, mother, brother or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts, and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts."

By this section is established the general line of succession, and is a general table of descents. This section points out the heirs nearest in line in any given case. Andrew J. Berryhill left no child, nor the descendants of any child. Subdivision one, as above set forth, does not apply to the facts in this case. The second subdivision places the father next in line of succession, and under this subdivision George Franklin Berryhill takes title in fee to the land in controversy as heir of his son, under the patent to the heirs issued by the United States and the Creek Nation.

The leading case construing this section, by the Supreme Court of the State of Arkansas, is the case of *Kelly's Heirs* v. *McGuire,* reported in 15 Ark. 555, and the court in its opinion in that case says:

"The first section is general and comprehensive embracing all lands whether ancestral or *newly acquired,* subject to certain exceptions and qualifications hereinafter more particularly noticed, and these exceptions refer to real estate alone. * * *

"The effect of the first section, subject to exceptions and qualifications alluded to is to vest an absolute estate of inheritance to lands in the person who takes."

And in making its several conclusions the court further says:

"After carefully considering each of the provisions of the statute, and all together as a whole, we have come to the following conclusions:

6th. That, when the inheritance is fixed by these facts in any given line, it will pursue that line until it becomes extinct, and the objects of bounty, and the order in which they succeed one another, and the proportion they take, all to be ascertained by the first section, which is to be considered as the general table of descent."

Keeping in mind that this is a case of title to heirs by purchase and not by descent, we assert that the persons standing nearest in the line of succession being once determined, the purpose of the reference to the statute is over; and the heir or heirs nearest in line take equally in their own right, regardless of the proportions they would have taken had the estate come to them by descent.

In the case of *Brown* v. *Belmarde*, 3 Kan. 40, the Supreme Court had before it a question similar to the one under consideration, and the court said:

> "The record shows that he (Lavonture, the member of the Indian tribe) did die in 1847. Therefore, from that time to the passage of the Act of May 26, 1860, the whole title to the lands in controversy was in the Government. That act operated as an original grant to the persons who shall be ascertained to be meant by the word 'heirs' used therein.
>
> "It was insisted in the argument that whoever would under the law have inherited the real estate generally of Lavonture at the time of his death, are the persons meant by the word 'heirs' in the Act of Congress. * * * But we know no rule of construction that would authorize such a conclusion.
>
> "Assuming, as above indicated that the act of Congress operated as an original grant, and that the word 'heirs of deceased reservees' are merely *descriptio personae*, the question is of comparatively easy solution."

In the case of *Ward* v. *Stowe, supra*, decided by the Supreme Court of North Carolina, the court had before it the construction of a will, the language of which is as follows:

> "It is my will, and I do allow, that all the remaining part of my estate, both real and personal, be equally divided amongst the heirs of my brother, John Ford, the heirs of my sister, Nancy Stowe, the heirs of my sister, Sallie Ward, and my nephew, Levi Ward."

The court held in that case that the statute of descent must be looked to, to determine who should take as the heirs nearest in the line of succession. This once established, the purpose of the reference was over, and the persons thus ascertained take as tenants in common, the same as if they had been specially named in the will.

The Supreme Court of California, in two separate cases, construing two separate Acts of Congress, has announced and sustained the contention argued herein.

In *Cooper* v. *Wilder,* 43 Pac. 591, the court had before it the construction of the Act of Congress known as the "Timber Culture Act" (20 Stat. L. 113.) Under this act, the land in controversy was entered as a timber culture claim by one David Cooper in 1879. Cooper died in 1881, testate, but without completing a compliance with the provisions of the Act of Congress. By the will of David Cooper his widow was made the sole beneficiary. The property was distributed by the probate court to the widow. Subsequently, a patent to the lands was issued to the "Heirs of David Cooper, deceased." The plaintiff claimed as an heir of David Cooper. The court held that Cooper, at the time of his death, had not title to the land; that, therefore, he could not devise it; that the heirs took as purchasers directly from the United States; and that when the patent issued it inured directly from the United States in the heirs. It held further who the heirs

were must be determined by the law of California; but the personnel of the heirs being once determined they take in equal shares regardless of the share they would have taken had it been a title by descent. The court used the following language:

> "We must hold, therefore, that the land was not devisable, and is not affected by the decree of distribution in the estate of David Cooper, deceased. The grant is to the heirs of David Cooper, but they do not take by inheritance. The heirs will therefore take equally, regardless of the proportions in which they would have taken under the laws of succession of the state. The United States has no general law of succession. The heirs must, therefore, be found by the law of the state or territory in which the land is situated. By law of this state, the widow is an heir of the husband. The plaintiff and the widow would therefore take equally."

The controlling evidence in the Timber Culture Act and the one under consideration are similar. In both cases the conveyances were made to the heirs direct, and the heirs taking as purchasers, take without reference to the proportion they would have taken had it been a case of title by descent.

In the case of *Braun* v. *Mathieson*, 116 N. W. Rep. 789, the Supreme Court of Iowa had before it for construction the said Timber Culture Act, approved June 14, 1878. In that case, one Ludwig Braun entered the land in controversy, and died before receiving a patent to the land. That after, under the terms of the act, a patent was issued to the

"heirs of Ludwig Braun, deceased." And the court following the decision of the Supreme Court of California in the case of *Cooper* v. *Wilder, supra,* and the decision of this Honorable Court in *Hall* v. *Russell, supra,* said:

> "The statute provides that, if the person making such entry at the time when the right to a patent accrues is dead, the 'heirs of legal representatives' of the entryman may prove compliance with the provisions of the act, and accordingly the patent to the land in question was issued to the 'heirs of Ludwig Braun, deceased.' It has uniformly been held that such a patent under the timber culture act or other statutes containing similar provisions passes title directly to the heirs as substituted beneficiaries, who take by purchase, and not by descent, and that the title vests in such heirs by the grant, and not as successors to the interest of the deceased entryman. * * *
>
> "But the local law is resorted to, not for the purpose of determining the distribution of the estate of a deceased person, but only to determine who are the grantees under such description in the patent. When the persons coming within the description of 'heirs' are determined by the local law, their interests are fixed by the patent itself, and not by the law of descent and distribution.
>
> "And this has been the construction placed upon the term 'heirs' by the Land Department of the United States under the timber culture statute. *King Timber Culture Entry,* 1 Land Dec. Int. 148; *Taylor Timber Culture Entry,* 1 Land Dec. Dep. Int. 163; *Rabuck* v. *Cass,* 5

Land Dec. Int. 398; *Starkweather* v. *Starkweather,* 15 Land Dec. Int. 162."

We submit that the principles announced by these cases are absolutely sound and are all decisive of the proposition under consideration.

While there is some conflict in the decisions where the testator makes a devise to his heirs, or to the heirs of a third person, there is, nevertheless, entire unanimity in the decisions construing a public grant to the heirs.

—*Walker* v. *Ehresman,* (Neb.) 113 N. W. Rep. 218;
Aspey v. *Barry,* (S. D.) 83 N. W. Rep. 91.

The section of the Act of Congress under which the lands in controversy were patented provided that the lands to which a deceased citizen would be entitled if living shall descend to and *be allotted* to his heirs. Under this section the United States and the Creek Nation had the power and authority to specifically name and designate the heirs and the grantees in each patent.

It cannot be said that George Franklin Berryhill was limited to a life estate in this property.

Section 10 of the said chapter 49 of Mansfield's Digest of the Statutes of Arkansas (M. D., Sec. 2531), is as follows:

"In cases where the intestate die without descendants, if the estate come by the father,

then it shall ascend to the father and his heirs; if by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then, descend. in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided."

As shown by the case of *Kelly's Heirs* v. *McGuire,* 15 Ark. 555, this section sets forth the exceptions to the general table of descents as shown by section 1 (M. D., Sec. 2522), and in determining the line of succession in any given case we must look first to section 1 as establishing the general line. Next to be examined, is the tenth section, to ascertain if our case comes within the exceptions of that section.

The very first inquiry in determining the application of this tenth section is the quantity and quality of the estate of which the intestate died seized. Actual seizin is absolutely necessary before this section is applicable. The next inquiry is the source of the decedent's title.

Now, examining the first section, we find that George Franklin Berryhill, the father, is the heir nearest in the line of succession, and that under that section he takes the fee, unless the case comes under the exceptions set forth in the tenth section. This latter section says, that if the estate came to the intestate from the father's line, it shall go back to the

father and his heirs; but if the estate be a new acquisition to the intestate, that is, an estate acquired by the intestate during his lifetime through his own industry, or by gift or devise from a stranger, it shall, on his death, go to his father for life, and in remainder to the intestate's collateral kindred. To say that, in the present case, the lands in controversy were a "new acquisition" to Andrew J. Berryhill, we submit, would be untrue; and equally so to say that the law applicable to "new acquisitions" should be considered applicable.

It is, nevertheless, urged by the plaintiff in error that the court should treat the present case as one of title by descent, and a new acquisition in the hands of Andrew J. Berryhill; that section 10 (M. D., Sec. 2531) should be looked to for the rule, and that that section should vest in the father, George Franklin Berryhill, but a life estate, with the remainder in fee to the paternal uncles and aunts, the grantors of the plaintiff in error; this, under the clause of said section, which sends the remainder "to the collateral kindred of the intestate in the manner provided in this act." We would ask, where in said chapter 49, are the collateral kindred nominated? It cannot be said that they are to be determined by the provisions of the next succeeding section (M. D., Sec. 2532), which are, that "in default of a father," the estate shall go, "first, to the brothers and sisters of the father;" next "to the brothers and sisters of the mother." Obviously, this

section is inapplicable. It is submitted that the words of section 10, "to the collateral kindred in the manner provided in this act," have reference solely and exclusively to the collateral kindred as pointed out in the first section of the chapter, which sets forth the general line of descent.

To vest a life estate in the father of Andrew J. Berryhill resort must be had to two separate fictions: *First,* it must be assumed that the estate came to the father by descent from his son, Andrew J. Berryhill; and, *second,* that the estate was a new acquisition in the hands of Andrew J. Berryhill.

We confidently assert that no fiction is necessary or warranted. The facts and the law are to be taken as they present themselves, and the all controlling fact is that Andrew J. Berryhill never had the least vestige of any right, title or interest, either legal or equitable, in the hands in controversy, nor in any other lands in the Creek Nation. The lands here are a new acquisition for the first time *in the hands of the heirs;* the heirs are the recipients of the Government's bounty; who the heirs are must be determined by an examination of said section 1 (M. D., Sec. 2522) of the Arkansas law of descent; and that section, pointing out the father as the first and nearest in line to the intestate, vests the title in him absolutely by purchase.

It cannot be said that the Arkansas law of descent not only nominates the heirs, but also defines

the quantity and duration of the estate to be taken by them. We submit that under the authorities heretofore cited, this contention would be wrong; but, admitting it, for the sake of argument, still George Franklin Berryhill, the father, would have taken the fee, and not a mere life estate. The one section of the whole chapter of the Arkansas law of descent which provides for the vesting of a life estate in either the father or mother, is said section 10 (M. D., 2531), and that only where the intestate dies *seized* of an estate which is a *new acquisition to him. The new acquisition here is to the heirs;* and, unless the court broadly assumes a different state of facts, section 1 (M. D., Sec. 2522), is the only section to be considered. Under that section, even it is determined that the word "heirs" defines not only the personnel of the grantees, but also the quantity of their estate, still the conclusion is irresistible that the father would take the whole estate in fee.

In conclusion, it is respectfully submitted that the devolution of the lands in controversy was in accordance with section 1 (M. D., 2522); that the estate was neither ancestral nor a new acquisition and that George Franklin Berryhill took the title in fee simple by direct grant from the United States and the Creek Nation.

Respectfully submitted,

JOHN B. MESERVE,
Amicus Curiae.

McDOUGAL *v.* McKAY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 676. Argued April 14, 1915.—Decided April 26, 1915.

In construing an Act of Congress, its known purpose must be effectuated as nearly as may be.

This court will not disregard the effect of decisions of the state and Federal courts in regard to descent of Indian allotments which have become rules of property and on which many titles have been acquired.

Under the Supplemental Creek agreement of June 20, 1902, the descent

and distribution of allotments is in accordance with chapter 49, Mansfield's Digest of the Laws of Arkansas, provided, however, that only Creek citizens and their descendants shall inherit lands of the Creek nation unless there are no Creek citizen heirs.

The provisions in Mansfield's Digest, distinguishing between ancestral estates which came to a decedent by a parent and new acquisitions and prescribing different rules of inheritance, apply to allotments of a Creek infant born in May, 1901, and dying in November 1901, and whose name was placed on the tribal rolls in October, 1902 pursuant to the provision in the Supplemental Creek agreement of 1902.

An allotment made under the Supplemental Creek agreement of 1902 must be treated, not as a new acquisition, but as an ancestral estate within the meaning of chapter 49 of Mansfield's Digest.

Where a Creek infant, whose allotment was made under the supplemental agreement of 1902, died leaving a father of Creek blood and a mother not of Creek blood the father takes a fee simple to such allotment; had both parents been of Creek blood and duly enrolled each would have taken one-half.

43 Oklahoma, , affirmed.

THE facts, which involve the construction and effect of the Supplemental Creek Agreement of June 30, 1902, and the ascertainment of heirs of an infant of the Creek Nation enrolled after death, are stated in the opinion.

Mr. M. E. Rosser, with whom *Mr. Wm. S. Cochran* was on the brief, for plaintiff in error:

As to the Arkansas statutes and the construction thereof in Arkansas and Indian Territory see c. 49 Mansfield's Digest; *Robinson* v. *Belt*, 107 U. S. 41; *Sanger* v. *Flow*, 48 Fed. Rep. 152; *Blaylock* v. *Muskogee*, 117 Fed. Rep. 152; *S. C.*, 64 S. W. Rep. 609; *McFadden* v. *Blocker*, 48 S. W. Rep. 1043; *Boyd* v. *Mitchell*, 64 S. W. Rep. 610; *Zufall* v. *United States*, 43 S. W. Rep. 760; *Randolph* v. *United States*, 43 S. W. Rep. 1098; *Carter* v. *Barton*, 48 S. W. Rep. 1017; *LeBosquet* v. *Myers*, 103 S. W. Rep. 770; *Bostic* v. *Eggleston*, 104 S. W. Rep. 566; *Western Investment Co.* v. *Davis*, 104 S. W. Rep. 573; *Kelly* v. *Mc-*

Guire, 15 Arkansas, 555; *Hogan* v. *Finley*, 52 Arkansas, 55; *Magness* v. *Arnold*, 31 Arkansas, 103; *Wheelock* v. *Simons*, 75 Arkansas, 19.

The land was a new acquisition in the allottee and not an ancestral estate. Act June 28, 1898, 30 Stat. 495; Original and Supplemental Creek Agreements, 31 Stat. 861, 32 Stat. 500; Act April 26, 1906, 34 Stat. 137; *Sizemore* v. *Brady*, 235 U. S. 441; *Reynolds* v. *Fewell*, 236 U. S. 58; *Magness* v. *Arnold*, 31 Arkansas, 103; *Hogan* v. *Finley*, 52 Arkansas, 55; *McKee* v. *Henry*, 201 Fed. Rep. 74.

Citizenship in Creek Nation is not a property right at all. *Cherokee Intermarriage Cases*, 203 U. S. 76; *Wallace* v. *Adams*, 143 Fed. Rep. 716; *Stephens* v. *Cherokee Nation*, 174 U. S. 445.

The lands of the Creek Nation prior to allotment belonged to the Creek Nation as a political body and not to the individual members. 2 Kappler's Indian Laws, 1904 ed.; *Eastern Cherokees* v. *United States*, 117 U. S. 312; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Journeycake*, 155 U. S. 197; *Fleming* v. *McCurtain*, 215 U. S. 56; *Ligon* v. *Johnson*, 164 Fed. Rep. 670; *McKee* v. *Henry*, 201 Fed. Rep. 74; *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Sizemore* v. *Brady*, 235 U. S. 441; 2 Minors' Institute, 3d ed., pp. 78 and 86; 2 Blackstone, Lewis ed. 569, *p. 109, and see p. 208; *Kelly* v. *McGuire*, 15 Arkansas, 555.

George Franklin Berryhill not only never owned the land but he never could have owned it had Andrew J. Berryhill not lived at the proper time to obtain it as an allotment. Original Creek Agreement, 31 Stat. 861.

The Supreme Court of the State of Oklahoma erred in holding that the evidence offered to the effect that the decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal* had not been followed or acquiesced in by the bar of the State of Oklahoma, or by the *nisi prius* judges, was not admissible. 11 Cyc. 755.

The Supreme Court of Oklahoma erred in holding that the decision in *Shulthis* v. *McDougal* had become a rule of property. 69 Central Law Journal, 217; *Roberts* v. *Underwood*, 127 Pac. Rep. 261; *Barnes* v. *Keys*, 127 Pac. Rep. 261.

Rules of property can be created only by courts of last resort. 11 Cyc. 756; *Ocean Beach Association* v. *Brinley*, 34 N. J. Eq. 438, 448; *American Mortgage Co.* v. *Hopper*, 64 Fed. Rep. 553; *The Madrid*, 40 Fed. Rep. 677; *Gannon* v. *Johnston*, 140 Pac. Rep. 430.

To establish a rule of property the doctrine must be acquiesced in. Bledsoe's Land Laws, 1st ed., § 62.

Justice requires reversal of the rule in *Shulthis* v. *McDougal*. *Mason* v. *Nelson*, 18 L. R. A. (N. S.) 1221.

In support of these contentions see cases cited *supra* and Chamberlayne on Evidence, §§ 849–850; Oklahoma Bar Assn. Report, 1909, p. 161; *Pigeon* v. *Buck*, 38 Oklahoma, 101; *Shulthis* v. *McDougal*, 170 Fed. Rep. 529; *S. C.*, 225 U. S. 561; 2 Minors' Insts., 3d ed., p. 519; Rev. Stat., § 2289; 32 Stat. 500; 34 Stat. 137.

Mr. George S. Ramsey, with whom *Mr. Edgar A. de Meules* was on the brief, for defendant in error:

The land in question was allotted to the heirs of Andrew J. Berryhill, and while the heirs take by purchase technically, yet the Arkansas law of descent should be applied just the same as if the heirs of Andrew J. Berryhill had actually inherited the allotment.

There should be no difference in the application of the Arkansas law of descent to a case where the heirs take by purchase technically, instead of by actual descent.

The heirs take *per stirpes* and not as a class *per capita*—discussed with cases and authorities cited.

The allotment of a Creek citizen is not a new acquisition under the Arkansas law, but in the nature of an ancestral estate, his allotment being his birthright, and his right

to the same being acquired by virtue of being a member of the tribe.

Under the Arkansas law of descent it becomes necessary to determine whether or not the estate is ancestral or a new acquisition when there are no descendants—when the allotment passes in the ascending line it is absolutely material to first determine whether the estate is ancestral or new in order to discover the course of descent, that is, whether to the maternal or paternal side, but this is immaterial so long as there are descendants.

To allot the lands of an Indian tribe among the citizens thereof is not the grant or donation of a new title, but is more in the nature of a partition of prior rights.

That an allotment is not a new acquisition and not analogous to the acquisition of title to the public domain of the United States, see opinion of the Eighth Circuit Court of Appeals in *Shulthis* v. *McDougal*.

As said by this court in *Worcester* v. *Georgia*, 6 Pet. 515, "To contend that the word 'allotted' in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged would . . . do injustice to the understanding of the parties."

Indian allottees are not donees of the Government.

In support of these contentions, see *Brown* v. *Belmarde*, 3 Kansas, 35; *Bassett* v. *Granger*, 100 Massachusetts, 348; *Baskin's Appeal*, 3 Pa. St. 304; *Bailey* v. *Bailey*, 25 Michigan, 185; *Beecher* v. *Wetherby*, 95 U. S. 517; *Beam* v. *United States*, 162 Fed. Rep. 260; *Campbell* v. *Wiggins*, Rice's Eq. 10 (S. Car.); *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; Const. & Laws of Muskogee Nation by McKellop, 57; *Choate* v. *Trapp*, 224 U. S. 671; *Duffy* v. *Hargan*, 50 Atl. Rep. 678; *Dunlap's Appeal*, 9 Atl. Rep. 936; *Dukes* v. *Faulk*, 37 S. Car. 255; *S. C.*, 34 Am. St. Rep. 745; *Delaware Indians* v. *United States*, 193 U. S. 129; *Davidson* v. *Gibson*, 56 Fed. Rep. 443; *France's Estate*, 75 Pa. St. 220;

Forrest v. *Porch*, 45 S. W. Rep. 676 (Tenn.); *Fleming* v. *McCurtain*, 215 U. S. 56; *Fairbanks* v. *United States*, 223 U. S. 215; *Goat* v. *United States*, 224 U. S. 458; *Harvey* v. *Beach*, 38 Pa. St. 500; *Houghton* v. *Kendall*, 7 Allen (Mass.), 72; *Holbrook* v. *Harrington*, 16 Gray (Mass.), 102; *Henry* v. *Thomas*, 20 N. E. Rep. 519; *Hockett* v. *Alston*, 58 S. W. Rep. 675; *S. C.*, 110 Fed. Rep. 910; *Jones* v. *Meehan*, 175 U. S. 1; *Johnson* v. *Bodine*, 79 N. W. Rep. 348; *James* v. *Smith*, 58 S. W. Rep. 715; *Johnson* v. *McIntosh*, 8 Wheat. 543; *Kendall* v. *Gleason*, 152 Massachusetts, 457; *Kelly* v. *McGuire*, 15 Arkansas, 555; *Lipman's Appeal*, 30 Pa. St. 180; *Lott* v. *Thompson*, 15 S. E. Rep. 278 (S. Car.); *Lawton* v. *Corlies*, 27 N. E. Rep. 847; *Ligon* v. *Johnston*, 164 Fed. Rep. 670; *Mullen* v. *Read*, 64 Connecticut, 240; 42 Am. St. Rep. 174; *Minter's Appeal*, 40 Pa. St. 114; *Minnesota* v. *Hitchcock*, 185 U. S. 396; *Martin* v. *United States*, 168 Fed. Rep. 205; *Nivens* v. *Nivens*, 64 S. W. Rep. 604; *Parr* v. *United States*, 153 Fed. Rep. 462; *Russell* v. *Hall*, 101 U. S. 503; *Reynolds* v. *Fewell*, 236 U. S. 58; *Rand* v. *Sanger*, 115 Massachusetts, 124; *Ruggles* v. *Randall*, 38 Atl. Rep. 885; *Richards* v. *Miller*, 62 Illinois, 417; *Rush* v. *Thompson*, 53 S. W. Rep. 333; *Sizemore* v. *Brady*, 235 U. S. 441; *Shulthis* v. *McDougal*, 170 Fed. Rep. 530; *S. C.*, 162 Fed. Rep. 331; *Sweet* v. *Dutton*, 109 Massachusetts, 589; *Sheetz's Appeal*, 82 Pa. St. 213; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Spalding* v. *Chandler*, 160 U. S. 394; *Templeton* v. *Walker*, 55 Am. Dec. 646; *Thorn* v. *Cone* (Okla.), not yet reported; *United States* v. *Cook*, 19 Wall. 591; *Washington* v. *Miller*, 235 U. S. 422; *White* v. *Stanfield*, 146 Massachusetts, 424; *Wood* v. *Robertson*, 15 N. E. Rep. 457; *Woodward* v. *James*, 22 N. E. Rep. 150; *Wilson* v. *Owens*, 86 Fed. Rep. 572; *Worcester* v. *Georgia*, 6 Pet. 515.

Mr. John B. Meserve filed a brief as *amicus curiæ:*

The lands allotted and with which we are concerned in this case were allotted and conveyed by the United

States and the Creek Nation directly to the "heirs of Andrew J. Berryhill, deceased," and such heirs acquired title to said lands by purchase and not by descent. Supp. Creek Agreement, §§ 6 and 7; *Towner* v. *Rodegeb*, 75 Pac. Rep. 50; *Gould* v. *Tucker*, 100 N. W. Rep. 427; *S. C.*, 105 N. W. Rep. 624; *McCune* v. *Essig*, 122 Fed. Rep. 588; *Warnell* v. *Finch*, 15 Texas, 163; II Blackstone, Com., pp. 209, 240; 3 Washburn on Real Property, p. 4; *Tate* v. *Townsend*, 16 Mississippi, 316, 319; *Johnson* v. *Norton*, 10 Pa. St. 245; *Borgner* v. *Brown*, 33 N. E. Rep. 92; *Starr* v. *Hamilton*, 22 Fed. Cases, 1107; *Sizemore* v. *Brady*, 235 U. S. 441; *Hayes* v. *Barringer*, 168 Fed. Rep. 221; *Cook* v. *Childs*, 145 Pac. Rep. 406; Act of April 26, 1906, § 5; *Malissa Wiley Case*, July 13, 1908, Sec'y Interior Opinion; *Hall* v. *Russell*, 101 U. S. 503; *Hershberger* v. *Blewett*, 55 Fed. Rep. 170; *McKee* v. *Henry*, 201 Fed. Rep. 74; *Franklin* v. *Lynch*, 233 U. S. 505; *Woodbury* v. *United States*, 170 Fed. Rep. 302.

George Franklin Berryhill, as the father of Andrew J. Berryhill and as the heir nearest in the line of succession to Andrew J. Berryhill, acquired, under the laws of descent of the State of Arkansas, an estate in fee simple in the lands in controversy. *Auman* v. *Auman*, 21 Pa. St. 348; Mansfield's Digest § (1) 2522; *Kelly's Heirs* v. *McGuire*, 15 Arkansas, 555; *Brown* v. *Belmarde*, 3 Kansas, 40; *Ward* v. *Stowe*, 27 Am. Dec. 239 (N. Car.); *Cooper* v. *Wilder*, 43 Pac. Rep. 591; *Braun* v. *Mathieson*, 116 N. W. Rep. 789; *Wittenbrook* v. *Wheadon*, 60 Pac. Rep. 664; *Walker* v. *Ehresman*, 113 N. W. Rep. 218 (Neb.); *Aspey* v. *Barry*, 83 N. W. Rep. 91 (S. D.); Mansfield's Digest § (10) 2531.

Mr. E. G. McAdams and *Mr. Norman B. Haskell* filed a brief as *amici curiæ:*

No rule of property has been established by the decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal* and the Oklahoma decisions following it.

Had Andrew J. Berryhill lived to receive an allotment he would have taken the same, not technically merely, but substantially, by purchase from the United States and the Creek Nation, and not by descent from his tribal parent.

Under those circumstances, he would have taken the allotment as a new acquisition, by purchase from the United States and from the Creek Nation, even if it be assumed for the purpose of the argument that he took an equitable estate therein by descent from his tribal parent, because the source of the legal title is the controlling factor in determining whether an estate be a new acquisition or an ancestral estate.

Andrew J. Berryhill having died prior to the enactment of the legislation authorizing the making of an allotment to his heirs, and no estate, therefore, having vested in him, said allotment was not an acquisition, new or otherwise, in Andrew J. Berryhill; hence the allotment did not descend to his heirs either as an ancestral estate or as a new acquisition, under § 2531, Mansfield's Digest, but vested in his heirs, under § 2522, Mansfield's Digest, by direct grant from the United States and the Creek Nation, becoming a new acquisition in said heirs.

In support of these contentions, see *Anglo-American Land Co.* v. *Lombard*, 132 Fed. Rep. 721; *Barker* v. *Swenson*, 66 Texas, 408; *Calhoun Mining Co.* v. *Ajax Mining Co.*, 27 Colorado, 1; *S. C.*, 182 U. S. 499; *Collins* v. *Durwood*, 4 Tex. Civ. App. 389; *Goodright* v. *Wells*, 2 Doug. K. B. 771; *Hall* v. *Russell*, 101 U. S. 503; *Hill* v. *Heard*, 104 Arkansas, 23; *Kelly* v. *McGuire*, 15 Arkansas, 555; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349; *Nicholson* v. *Halsey*, 1 Johns. Ch. 417; *Robinson* v. *Belt*, 107 U. S. 41; *Selby* v. *Alston*, 3 Ves. Jun. 339; *Shulthis* v. *McDougal*, 170 Fed. Rep. 529; *S. C.*, 225 U. S. 561; *Sizemore* v. *Brady*, 235 U. S. 441; *Wilson* v. *Beckwith*, 140 Missouri, 359; *Woodbury* v. *United States*, 170 Fed. Rep. 302; Devlin on Deeds, §§ 9, 15.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The solution of this controversy requires ascertainment of the *heirs* of an infant who was enrolled after death, within the intendment of the Supplemental Creek Agreement—Act of June 30, 1902 (c. 1323, 32 Stat. 500).

Andrew J. Berryhill, born in May, 1901, died during the following November leaving his father—George Franklin Berryhill—an enrolled Creek Indian, his mother, a non-citizen of that Nation, and seven paternal uncles and aunts. His name was duly placed on the tribal rolls in October, 1902, and during the years 1904 and 1905 the land presently in controversy (with others) was allotted and patented to his heirs. The father claiming to be Andrew's sole heir—the mother joining—conveyed it June 5, 1906, to defendants in error, Edmond and Perry McKay. Afterwards the paternal uncles and aunts undertook to convey the fee subject to a life estate in the father to McDougal, plaintiff in error. The McKays and parties claiming under them being in possession of the property and extracting oil and gas therefrom, McDougal instituted this proceeding to restrain them and to have his remainder interest declared and confirmed.

The Supreme Court of Oklahoma (43 Oklahoma, 261) held the land must be treated as an ancestral estate in Andrew J. Berryhill and declared the father sole heir. Plaintiff in error maintains that it passed as a new acquisition and the father took a life estate with remainder over to the uncles and aunts. Counsel appearing as *amici curiæ* insist Andrew J. Berryhill had no estate therein, and that the word *heirs* designates persons who themselves took as purchasers.

Under treaty stipulations with the United States the Creek Tribe of Indians as a community for a long time owned and occupied large areas now within the borders of

Oklahoma and maintained there an organized government. Congress finally assumed complete control over them and undertook to terminate their government and distribute the tribal lands among the individuals. *Washington* v. *Miller*, 235 U. S. 422.

The act of March 1, 1901,—Original Creek Agreement (c. 676, 31 Stat. 861, 870)—effective May 25, 1901 (32 Stat. 1971), provided for the enrollment of members living on April 1, 1899, and their children born up to July 1, 1900, and also for allotment of tribal lands. It prescribed further (§ 28) that "if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

The Supplemental Creek Agreement—Act of June 30, 1902, c. 323, 32 Stat. 500, 501, effective August 8, 1902 (32 Stat. 2021), repealed that portion of the Original one establishing descent and distribution under the Creek Law and directed that thereafter these "shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: *And provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49." It also extended the right of enrollment to children born after July 1, 1900, and up to May 25, 1901, and declared "if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

The pertinent sections of Mansfield's Digest are copied in the margin.[1] They sharply distinguish between an es-

[1] *Section 2522.* When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

First. To children, or their descendants, in equal parts.

Second. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third. If there be no children, nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts.

Section 2531. In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his life-time, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her life-time; then to descend to the collateral heirs as before provided.

Section 2532. The estate of an intestate, in default of a father and mother, shall go, first, to the brothers and sisters, and their descendants, of the father; next, to the brothers and sisters, and their descendants, of the mother. This provision applies only where there are no kindred, either lineal or collateral, who stand in a nearer relation.

Section 2533. Relations of the half-blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance come to the intestate by descent, devise, or gift, of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

Section 2534. In all cases not provided for by this act, the inheritance shall descend according to the course of the common law.

Section 2543. The expression used in this act, "where the estate

tate which came to a decedent by a parent and a new acquisition and prescribe different rules of inheritance.

In *Shulthis* v. *McDougal* (170 Fed. Rep. 529), decided June 3, 1909, by the Circuit Court of Appeals for the Eighth Circuit, title to another portion of the Andrew J. Berryhill allotment was involved and it became necessary to ascertain his heirs. Having carefully considered the whole subject that court summed up its conclusions thus (pp. 534–535):

"So long as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private, separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect to by that act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe. It was his birthright. It came to him by the blood of his tribal parent, and not by purchase. In applying the Arkansas statute, we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands not as a new acquisition by him, but as an inheritance from his parents as members of the tribe. His father was the only parent through whom he

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shall have come to the intestate on the part of the father," or "mother," as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise or descent from the parent referred to, or from any relative of the blood of such parent.

derived his right, and to the father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the parents equally. From this premise it necessarily follows that George Franklin Berryhill succeeded to the entire estate of the property in question." An appeal to this court was dismissed June 7, 1912, for lack of jurisdiction (225 U. S. 561).

The Supreme Court of Oklahoma in *Lena Pigeon* v. *William Buck*, 38 Oklahoma, 101 (April 23, 1913), determined the heirs of a full-blooded Creek citizen who, having been duly enrolled, received a patent to her allotment and then died intestate, without descendants, leaving father, mother, brothers, sister and her husband. After reference to the above-quoted portions of Mansfield's Digest it said (pp. 103–104): "That the land in question was not a new acquisition, and pursuant to these sections, when construed together, passed to John Pigeon and Mate Pigeon, the father and mother of the deceased, is no longer an open question in this jurisdiction, having in effect been decided by the Circuit Court of Appeals for the Eighth Circuit in *Shulthis* v. *McDougal*, 170 Fed. Rep. 529. . . . Many titles to lands on the eastern side of this State have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property there (*De Walt* v. *Cline*, 35 Oklahoma, 197; *S. C.*, 128 Pac. Rep. 121; *MaHarry* v. *Eatman*, 29 Oklahoma, 46; *S. C.*, 116 Pac. Rep. 935; *Duff* v. *Keaton*, 33 Oklahoma, 92; *S. C.*, 124 Pac. Rep. 291), we hold that John Pigeon and Mate Pigeon, his wife, are the persons to whom, on the death of the allottee, this estate passed in equal moieties, and that plaintiffs in error, plaintiffs below, have no interest therein."

We recognize the unusual difficulties surrounding the problem presented upon the record, and appreciate the very forceful arguments offered in support of the conflicting theories. The circumstances are novel, and the canons

of descent contained in Mansfield's Digest are not precisely applicable thereto; but these rules must be accommodated to the facts and the great purpose of Congress effectuated as nearly as may be. And not only would it be improper for us to disregard the effect of the decisions already announced by the Circuit Court of Appeals and the Supreme Court of Oklahoma, which are supported by cogent reasoning, but considering the peculiar and rapidly changing conditions within that State especial consideration must be accorded to them. We accordingly accept the doctrine announced therein and hold: (*1*) The property must be treated as an ancestral estate which passed in accordance with the applicable provisions of chapter 49, Mansfield's Digest. (*2*) As the father, George Franklin Berryhill, was of Creek blood, and the mother not, he took a fee simple title to all the land in question. If both parents had been of Creek blood and duly enrolled each would have taken one-half.

Sizemore v. *Brady*, 235 U. S. 441, has been referred to as in conflict with the doctrine herein approved. In that case lands were allotted and patented after August 8, 1902, to the heirs of Grayson, an enrolled Creek, who died March 1, 1901, and a contest arose between a paternal cousin and cousins on the maternal side. The former—Brady—claimed descent should be determined according to Mansfield's Digest and that he was sole heir. The latter—Sizemore and Newberry—maintained the Creek Law applied and that they were the only heirs. The Supreme Court of Oklahoma decided in favor of Brady (33 Oklahoma, 169) and in this court the plaintiffs in error expressly admitted that he should prevail "in event the court should hold said lands passed under Chapter 49 of Mansfield's Digest of the Laws of Arkansas, in accordance with the Act of Congress known as the Creek's Supplemental Agreement." We concluded the Arkansas statute controlled and of course did not undertake to decide the

question here presented. Moreover, it is not possible from the record in the cause accurately to trace the blood of the maternal relatives.

The judgment of the court below must be

Affirmed.